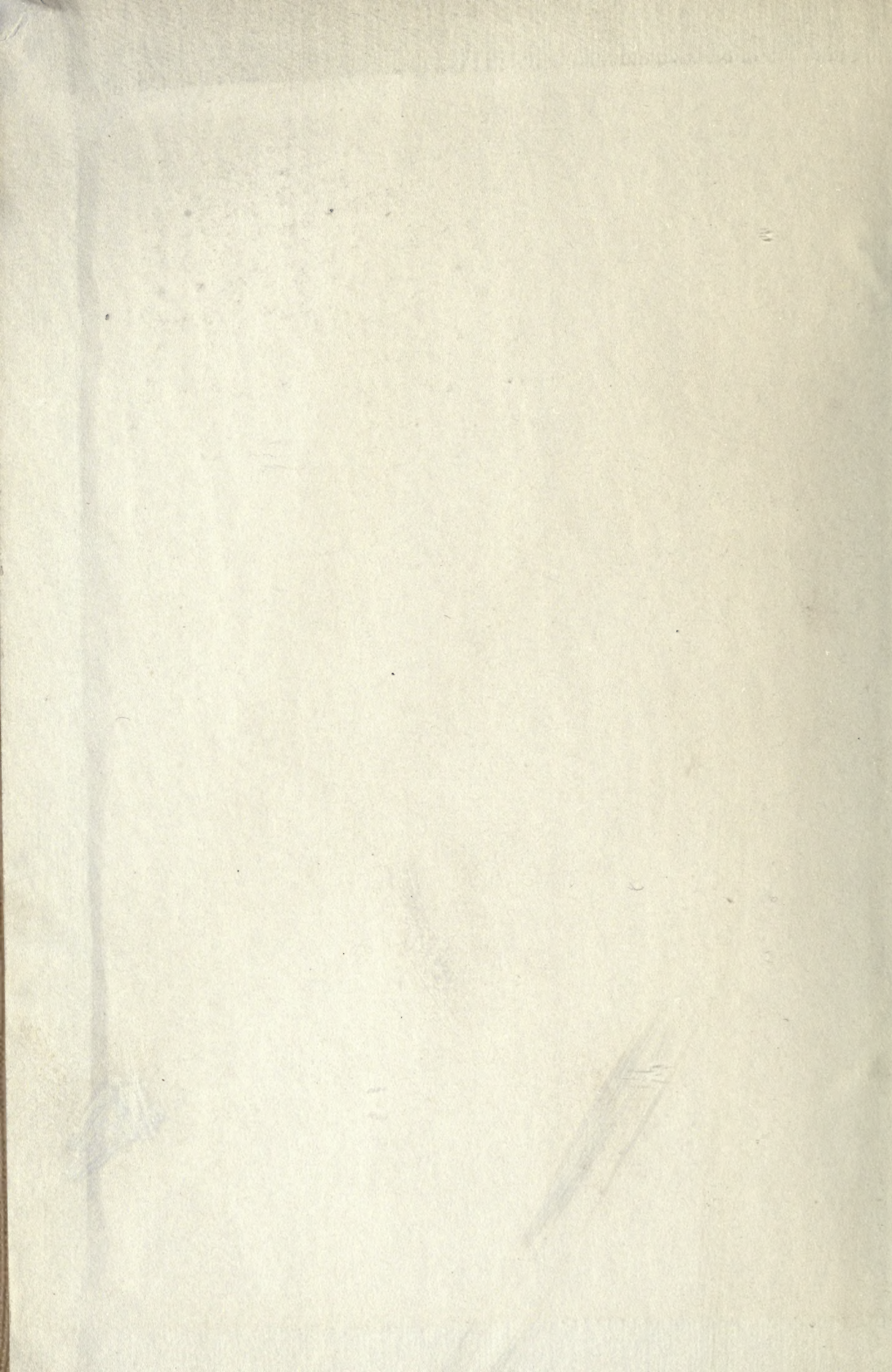
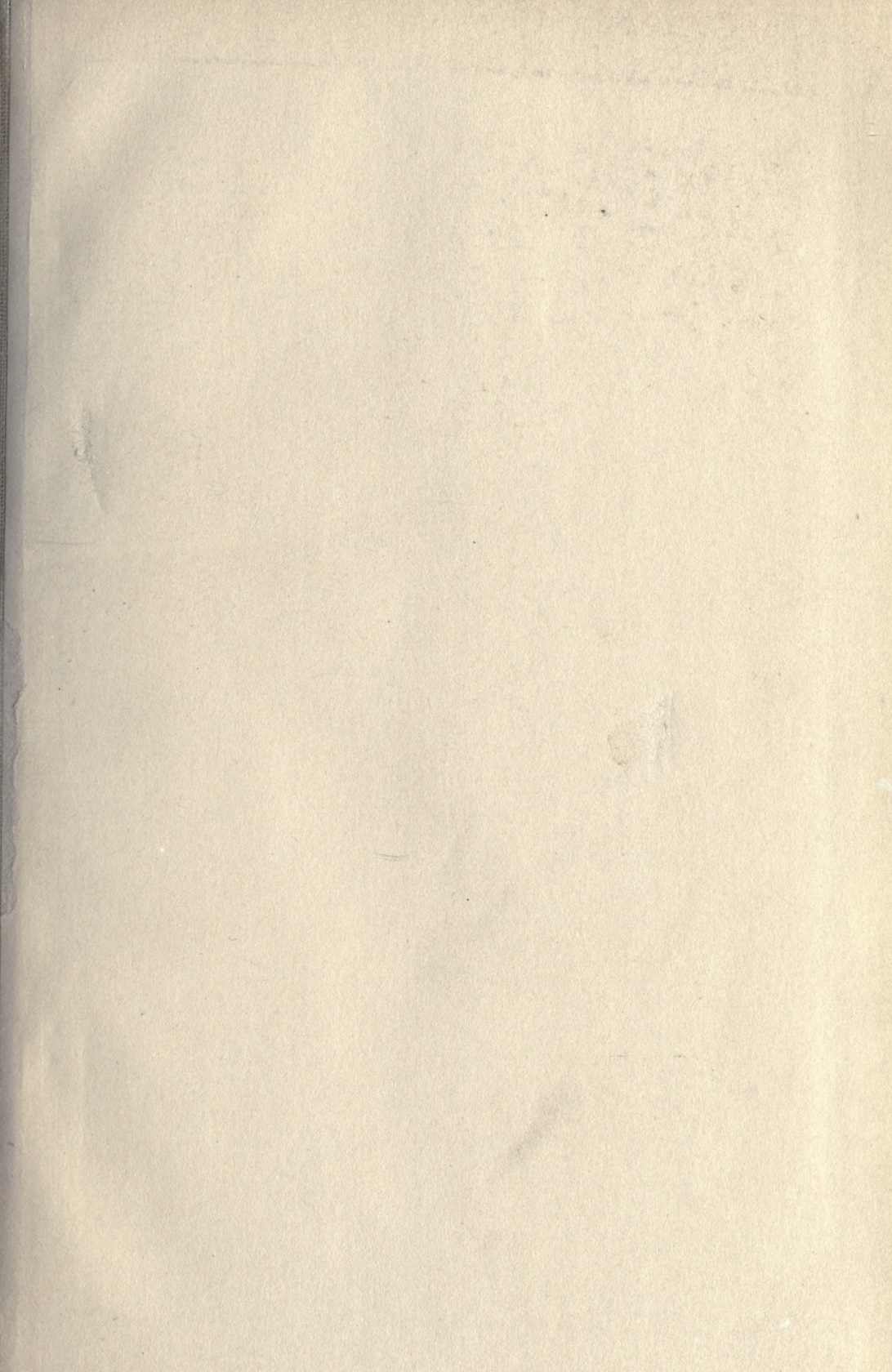
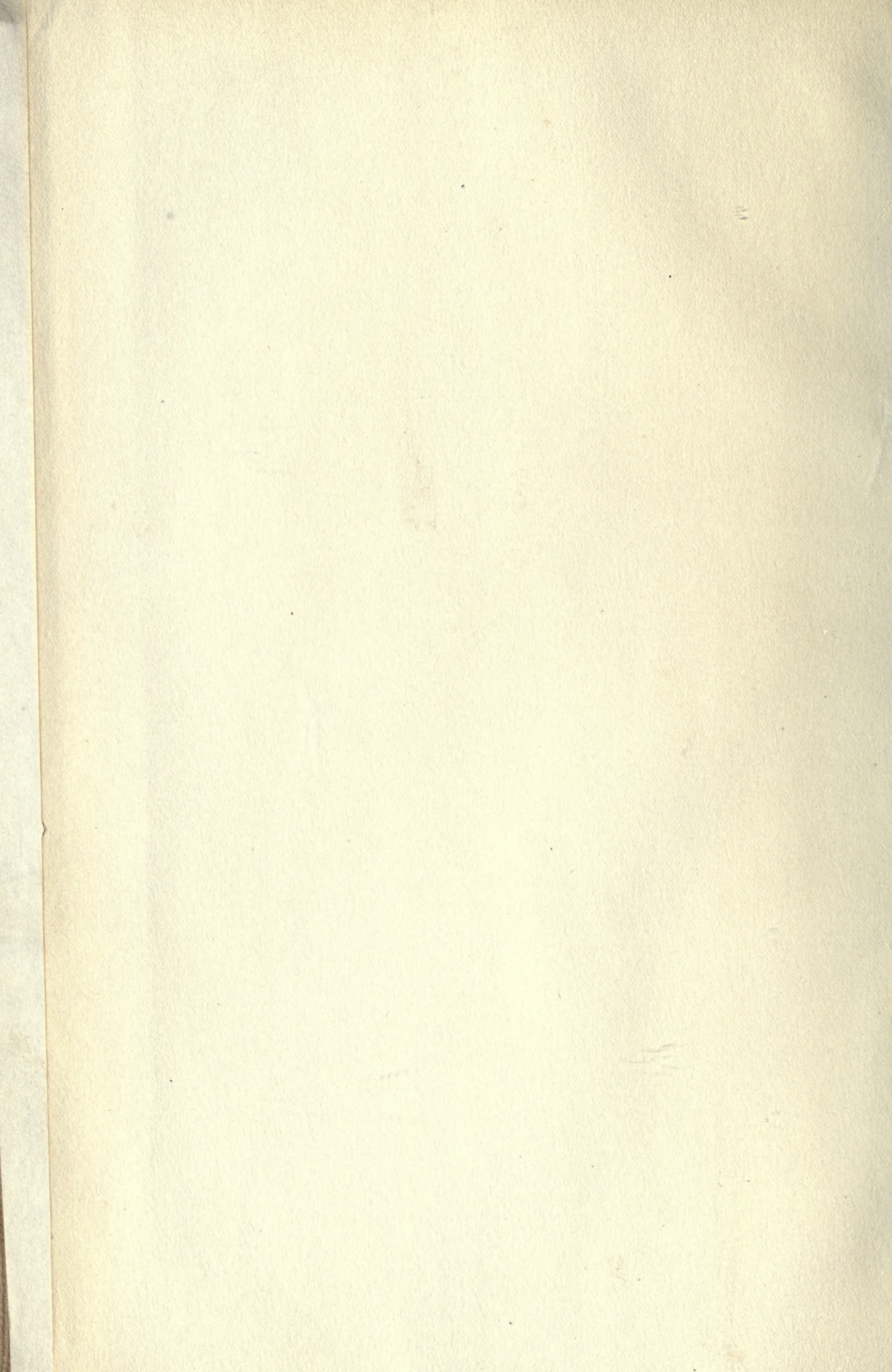




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THE TERMINOLOGY OF LEGAL SCIENCE (WITH A PLEA FOR THE SCIENCE OF NOMO-THETICS)

THE two languages best fitted by circumstances as tools in scientific discussions are English and Japanese, because they can draw traditionally upon two entirely distinct stocks of language-roots (English has virtually three) for the formation of terms. Thus precision in shades of meaning and differentiation of style is attainable. Every student of logic knows, but seldom realizes, the power and the actual historic influence of terms in moulding thought and in affecting the result of controversy. Recently Dr. Wurzel's "Das juristische Denken" (1904) has revealed how deeply the logical aspect of words is responsible for to-day's great problem of securing legal progress by adjusting the functions of judge and legislator.

In law, the German language has been less of an obstacle to German scientific thought than in any other field; because the reception of Roman law, four hundred years ago, furnished a second set of roots for terms used in technical discussion and development of ideas. Four hundred years ago the French law language of Norman descent might have formed a suitable nucleus for the development of scientific legal terminology in England. But England later expelled instead of receiving the foreign law, and English law never developed a scientific terminology. Indeed, its French roots went to form the popular and unscientific law-language.

Hence, little facility for correct thinking. Even the term "jurisprudence" is used in English in a bastard sense, unrelated to any usage elsewhere. And the advantages of the English language have never been utilized for legal science, while the other sciences have freely made use of them.

It is time that we set about developing a proper terminology. With the ground clear, the opportunity is favorable. Though of course it will take a long time to reach an agreement, nevertheless we should essay a beginning. It is a legitimate enterprise for philosophers and jurists.

It is here proposed (I) to offer tentatively a terminology for legal science; (II) to make a plea for the special study of one part of legal science.

I

It is not desired to dispute or to settle now the definition of law itself. Let us assume this:

Law is the *quality of being uniform and regular in a series of events*, whether in human or in external nature. There may, therefore, be cosmic law, moral law, social law, and *jural law*. The last is here involved.

Jural law is a rule expressing the relations of human conduct conceived as subject to realization by state force.

The Science of Law — meaning all systematic knowledge about law — should be divided, not according to the kinds of law, nor the subject of law, but according to *the ways in which we conceive of law as an operative fact in its relations to the world*. Such is the thesis of the present paper. Other classifications seem not to have taken this point of view; hence the excuse for this new one.

Why is it a useful one? Because the data of our thinking about law differ greatly according as we are thinking about it in one or another aspect. For example, — *Is it the law that a father has a right against him who causes the child's death?* To answer this, we look at certain statutes and decisions. *Ought it to be the law that such a right exists?* To answer this, we look chiefly at a different group of materials, regardless of whether the law *is* or is not so. Dynamically, how *did* this actual law *become* whatever it now is? Here, again, we look chiefly at a still different set of data.

Thus, if a science is to be subdivided according to its various

materials, it seems desirable to subdivide legal science from the above point of view. And as law is a peculiar human fact, having no exact analogy in any of the other sciences (political science is the nearest), it is not strange if such a classification would have no direct parallel elsewhere.

In choosing names for the various branches of legal science, let us remember the etymological treasures of our language, and seek to avoid the inherited curse of ambiguity by doing two things, — (1) using recognized roots to form words more or less new, and (2) forming a consistent body of terms. (One need not here recall the various writers, from Whewell down, who have discussed, reprovéd, and justified this method of terminology. In defense suffice it to say that it has orthodox support; that electrical science is a good example of its beneficence; and that its shortcomings in geology and in chemistry are proofs only that it may or may not be feasible with a given science).

The proposed terminology would be as follows:

The Science of Law as a whole may be termed *Nomology*.

The science may be classified according to the different activities of thought which deal with the fact of law. These are four:

Law may be conceived of as

(1) A thing to be *ascertained* as a fact of human conduct; this branch to be termed *Nomo-scopy*.

(2) A thing to be *questioned* and debated as a rule which by some standard might be different from what it is; this branch to be termed *Nomo-sophy*.

(3) A thing to be *taught* as a subject of education; this to be termed *Nomo-didactics*.

(4) A thing to be *made* and *enforced* by the state organs; this to be termed *Nomo-practics*.

1. *Nomo-scopy* has three branches of activity:

(a) It may concern itself with ascertaining the *actual* law of a given moment, by studying the sources in which the existing law is to be found, — statutes, decisions, customs, decrees, etc.; this to be termed *Nomo-statics*.

(b) It may concern itself with the former condition, *history*, and development of a rule of law; this to be termed *Nomo-genetics*.

(c) It may concern itself with the relation between law and other facts and their sciences; this to be termed *Nomo-physics*.

2. *Nomo-sophy* has three branches of activity:

(a) It may take a standard of *logic*, analyze the rules of law, and examine their consistency as a system; this to be termed *Nomo-critics*.

(b) It may, by a standard of *ethics* (whether divine, moral, or social) examine their conformity to that standard; this to be termed *Nomo-thetics*.¹

(c) It may, by a standard of *economics* or other policies of social welfare, examine their conformity with this standard; this to be termed *Nomo-politics*.²

3. *Nomo-didactics* has a single branch only.

4. *Nomo-practics* has three branches of activity:

(a) It may be considered as a rule requiring to be particularized and *applied* in specific controversies and realized in concrete instances, thus giving rise to the *judicial* function, including the

¹ To illustrate the distinction between Nomo-critics on the one hand, and Nomo-thetics and Nomo-politics on the other hand:

Let the theory of corporate existence be determined on; *e. g.*, let a decision be rendered which goes upon the theory that a corporation is a real person created by the state's franchise; then when two corporations by vote attempt to consolidate, what is the effect, as a logical deduction from the theory already accepted in the prior decision? Most legal decisions under our traditional system reach their result solely by such a standard of reasoning; *i. e.*, they are dealing with the law as a science of Nomo-critics. But now ask whether economic or political conditions and policies ought to permit the consolidation of two corporations, and on what conditions; and here you come into the realm of Nomo-politics.

Again, take *Derry v. Peek*. The promoters of a corporation circulate a prospectus in which erroneous statements are recklessly made; an investor loses money by trusting to the prospectus. One legal question is whether the accepted doctrine of the law of deceit, as hitherto laid down, logically holds the promoters liable; *i. e.*, whether twenty-five prior decisions on various groups of circumstances logically are consistent with such a result. This is Nomo-critics. But if we ask further whether by accepted standards of ethics the rule of law ought to hold the promoter liable, regardless of the logic of prior decisions, we are traveling into Nomo-thetics.

Legal decisions frequently discuss a question by both standards. But they are none the less distinct standards, involving distinct branches of the science.

By the way, Bentham used the word "Nomo-thetics," but, I think, in a different sense.

² One might urge that this distinction between the standard of ethics and the standard of economics, etc., is not definite enough to mark off two branches of the science. It is indeed not definite, at boundary points. But that is only because the sciences of ethics and of economics, etc., are at certain points, not distinct. To the extent that they are, a distinction in legal science becomes needful. The distinction between ethics and economics used to be marked enough, fifty years ago. Perhaps it will become so again.

advocates and other court officers; this to be termed *Nomodikastics*.³

(b) It may be considered as a rule requiring to be formulated by some form of expression of the state's will, thus giving rise to the *legislative* function and its methods; this to be termed *Nomopoietics*.⁴

(c) It may be considered as a rule of *action* for various officers having duties under it, thus giving rise to the *executive* function; this to be termed *Nomo-drastics*.

One word, finally, in explanation. Though these sciences are theoretically distinct, the content of two or more of them may in actual life be needed or used by the same person at one time; thus the legislator may have to consider Nomo-thetics or Nomo-politics, just as any citizen may; the judge may make use of Nomo-scopy; and the teacher and the student may use all. Each of these terms covers a distinct form of thought about law; yet the different branches, of course, are neither physically nor intellectually separate bodies of learning, — for example, in the way that a book on astronomy may be expected to be separate from a book on economics. This is because law deals with conduct, and with our relation to that conduct, and our thought of law is and must be often passing from one aspect to the other, or dealing with several at once. Thus, a student may say, "That is the law, and if it is not, it ought to be"; and at that moment he is thinking both nomo-statically and nomo-thetically. The important thing is to separate these two modes of thinking about law, and to label them with terms which will emphasize their distinctness. The virtue of the above classification is that it forces us to realize that in one and the same page or speech our thought is dealing with a different mass of data about law. Take any page of juristic writing, and see for oneself how much ambiguity is cleared up by keeping separate these different aspects of legal science.

³ This branch involves in strictness only the structure and mechanism of judicial action, and that of its appurtenant organs; *e. g.*, the distinction between judicial and legislative or executive action, the organization of courts, the liberty of decision for the courts (*stare decisis*, etc.), the relation of advocate to court and of the state prosecutor to the court, etc.

⁴ This involves the structure and mechanism of the legislature, the methods of its action, the scope of different legislative bodies' powers (constitution, etc.), and, of course, the relation of legislature to courts and executive.

II

My second purpose here is to plead the cause of *Nomo-thetics* (and incidentally, of *Nomo-politics*) as a subject of scientific study in law schools and colleges, and in the legal profession; *i. e.*, that branch of legal science which tests a proposed or actual rule of law by asking whether it *ought* to be the law, by some standard of ethics, or of economics, etc.

Now it is obvious that every legislative act, and many a judicial decision, has been based on some notion of what ought to be the law. To study this might easily involve the study of the policy of thousands of casual proposals, important or trifling. But this would not be science. To study *Nomo-thetics* and *Nomo-politics* as a science means to study the *system* of rules or principles. They are to be regarded as a connected whole, disregarding the isolated rules and policies, however important, such as the regulation of the liquor traffic, the liability of judges, and the like. It means the study of the principal legal relations, so far as they have foundations in ethical, political, economic, and social science, and an inquiry into their correctness; asking whether they *ought* to be, and testing them by any philosophical school or standard that one pleases to take.

A prime and practical reason for advocating this study is that we are on the eve of a great period of radical reconstruction; in other words, of popular *Nomo-thetics* on a large scale, and that the legal profession is totally unprepared, by its present habits of thinking, to take leadership or control in this movement. Everything is going to be questioned, and the bar is not even prepared to expound adequately the principles that should be preserved. From the right of property, through the rights of succession, testament, contract, divorce, to the very function of courts and procedure, there is not a single fundamental which we are prepared to expound intelligently from a scientific standpoint. For over a hundred years, since the radical thinking of the Revolutionary period, the American lawyer has thought systematically only of law as it is, not as it ought to be. Even the Harvard Law School, the leader in light and learning of law for forty years past, has hitherto cultivated almost solely the science of *Nomo-statics* and *Nomo-genetics* — of law

as it is and law as it has been — with an emphatic ignoring of Nomothetics and Nomo-politics.

Hence, it is high time to begin the systematic cultivation of Nomothetics as a science.

Where shall we find the materials?

A hundred years ago, and more, they were plentiful, in the treatises on the law of Nature. Since that philosophy has been discarded, there are few available sources. The French and Spanish writers are the only ones on the Continent who have produced any systematic ones in the last forty years; and those are practically all either based on a Roman Catholic philosophy, or are otherwise unadapted for our purpose.

But in English much modern material exists in the ethical and sociological philosophers: Spencer, Green, Sidgwick, Ritchie, are some of the writers whose materials could be gathered into a valuable mosaic for study by lawyers and law students. A volume has been reserved for this subject by the Editorial Committee of the Modern Legal Philosophy Series (published under the auspices of the Association of American Law Schools).

If the philosophers in our Universities will coöperate, this volume can be made highly serviceable for the purpose. The problem is to compress into less than 800 pages a selection of readings which shall represent different philosophical viewpoints on a few main topics, and shall thus furnish material for eclectic reading and for free discussion.

What shall these main topics be? The following division, into two parts and eight chapters, is proposed (advancing from the concrete to the abstract, for pedagogical reasons):

Part I. *Institutions of Private Right.*

1. Family Relations.
2. Property Relations; Ownership.
3. Property Relations; Testament and Succession.
4. Contract and Industrial Relations.

Part II. *Methods of Law.*

5. Justice and Law (Individual Equity *v.* Uniform Rule).
6. Courts and Legislation.
7. Procedure.
8. Lawyers and Litigation.

I must now admit that a strong doubt has been expressed by a

colleague of mine, learned in pure philosophy as in law, whether the materials of such a volume are entitled to be deemed a part of the "philosophy" of law. Perhaps the answer to this doubt turns on the distinction between the terms "science" and "philosophy," and thus resolves itself (like many differences of opinion) into a mere question of name. But even if "philosophy" of law be only a part of the "science" of law, and if the topic I champion be not within that field of "philosophy," I desire to emphasize that it is at least within the field of "science." That is, there is now proposed for cultivation, not a mere matter of the expediency of a specific legal measure, but a matter of a body of principles systematically connected as a whole. A given legal measure may indeed be treated from the narrow point of view of local immediate expediency; it is then not science. But it may also be treated as part of a system; then it becomes a science. For instance, a piece of carbon serves as the detector in a wireless telegraph apparatus; can you use a diamond pin as a detector, because a diamond is carbon? That is a specific issue, all by itself. But rise to the general question of carbon as a chemical element, its various forms, and its relations to hydrogen in the total quantity of cosmic material, and you have a matter of science. So here in Nomo-thetics. Ask whether by law a father in Illinois should to-day be obliged to leave one-fourth of his estate at least to his child by will; and you have a local issue, if you like, and nothing more, — not a matter worth classing as legal science. But ask whether in general the owner of property should be permitted unlimited power of disposal of his property at death; test this question by its relation to the general ethical and economic principle of individual ownership and the general principles of family and of inheritance; inquire into its world-history; test it by general experience in the countries where such measures have not prevailed. Coördinate it with the general ethical theory on which private right is recognized, both as to acquisition and duration; and endeavor to make a consistent whole. This seems to me to be a genuine matter of science. It involves radically and fundamentally the necessity of finding and having a general principle for the recognition of private right, — in short, a science of Nomo-thetics or Nomo-politics, — law as it ought to be, as distinguished from law as it is. Moreover, according to whatever school of thought — the positivist, the Kantian, the neo-Hegelian, the

idealist, the sociologic, and all the rest of them — you accept for your general philosophy of law, so your result is likely to differ in settling this particular principle of compulsory succession. Which seems to show that the science of law, if not indeed its philosophy, is involved.

Moreover, this branch of legal science seems to me to have a legitimate place in a law-school curriculum, I do not say how large a place it should have. I say merely that it should have *some* place, and that in our traditional curriculum hitherto it has had *no* place. And so I plead for the explicit and systematic cultivation, during the next generation, in our law schools and colleges, of the sciences of Nomo-thetics and Nomo-politics.

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PROXIMATE CONSEQUENCES IN THE LAW
OF TORTS

THE question of the proximateness of consequences arises in two classes of cases: first, where a person is to be held responsible for the consequences of some cause other than his own breach of duty, as in insurance, and secondly, where the cause is a breach of duty by him. The rules that prevail in the two classes of cases are very different. A consequence may be proximate for one purpose and remote for another. In the second class of cases the breach of duty may be a breach of contract or of some non-contractual obligation, or it may be a tort. There is a conflict of opinion as to whether the rules about proximateness are the same in cases of tort and of breach of contract. Without attempting to decide that question, the present discussion will be confined to cases of tort. The word "wrong" in this article will be used only of torts.

The question of proximateness may arise in relation to any one of various elements in a tort. Those elements are as follows.

First, there must be a breach of duty. A breach of duty is by an act or omission. For brevity's sake in the following discussion the word "act" will generally be used. What is said of acts may be applied *mutatis mutandis* to omissions. A duty is to do or not to do some act. The act to be done or omitted forms the content of the duty. The word "act" is here used in Austin's sense to denote a mere bodily movement, excluding its consequences. This is an act *stricto sensu*. An act *latiori sensu* includes certain of the near consequences of the bodily movement, which are called direct consequences. In a trespass the consequences must be direct, *i. e.*, must be included in the "act"; therefore in some cases, *e. g.*, negligently running over a person, where either trespass or case will lie, it is often said that trespass lies for the act itself and case for the consequences.

But an act *stricto sensu* in and by itself is never commanded or forbidden by law. What the law commands or forbids is always the production of certain consequences, which may be called the defini-

tional consequences of the act. For instance, a battery may be committed by a hundred different acts; the definitional consequence, which the law forbids, is the contact between the body of the injured person and the instrument with which the battery is committed. If I strike in the air with a stick or throw a stone when no one is near, I do precisely the same act as though some person stood where he would be hit; but since the act does not produce any injurious consequences, it is not a breach of duty. A duty, therefore, is not merely to do or abstain from an act, but to act or not to act so as to produce some definitional consequence specified by the law. The definitional consequences of acts are, therefore, also definitional consequences of duties.

Those consequences may be actual, probable, or intended. Therefore there are three classes of duties. (1) Duties of actuality, which are defined by reference to the actual consequences of the act. A person must or must not act so as actually to produce certain consequences. The duty is not broken unless the consequence is actually produced. Duties not to commit trespasses are of this sort. So is the duty of the possessor of a dangerous animal to prevent it from doing harm. He must do such acts as will actually prevent the harm; it is not enough that he uses due care to prevent it. (2) Duties of probability, defined by reference to the probable consequences of the act. The duty is to act or not to act in a way that will probably produce a certain consequence. The duty may be broken though the consequence never in fact happens, though in that case there will be no wrong because no right has been violated. This is the most numerous class of duties. Duties to use due care are of this kind. Negligence is conduct which will probably produce damage. Therefore, these duties may also be called duties of care or of due care. (3) Duties of intention, defined by reference to the intended consequences of the act. The duty is not to act with an intention to produce a certain consequence. Fraud and malice include such an intention; so that duties of intention may be subdivided into duties of mere intention, of fraud, and of malice. Here, too, there may be a breach of duty, though the intended consequence is not produced. It is a breach of duty to make a fraudulent misrepresentation, even though it is not believed or acted on, so that no harm results; though in that case there is no tort. A duty of actuality may also

belong to one of the other classes. There may be a duty not actually to produce a consequence intentionally or negligently. Duties not to commit trespasses are duties of actuality, but there is much conflict of opinion as to whether intention or negligence is necessary to a trespass. A duty of actuality, where intention or negligence is not necessary, a pure duty of actuality, may be distinguished as a peremptory duty. It must be carefully borne in mind that a breach of duty by itself is not a tort; it is only one element in a tort. There may be an undoubted breach of duty, and yet no tort.

The second element in a tort is a violation of right. The word "right" has various different meanings: there are various different kinds of rights; some of which kinds are incapable of being violated. The kind of rights here under consideration have for their contents not acts, as is the case with some of the other kinds of rights, but certain conditions of fact, whose existence and integrity the law seeks to protect for their holders. Any impairment of the protected state of fact is a violation of the right. The word violation, it should be noticed, is here used in a sense a little different perhaps from its ordinary one. It covers impairments of the protected state of fact which are not due to any one's wrongdoing. Therefore a violation of right, like a breach of duty, is not of itself a tort, but is only one element in a tort. If a person injures my body by mere accident, my right of bodily security is violated, in the sense in which I am here using that word, just as much as if he had done so on purpose; but there is no tort.

So far as the law of torts is concerned (the law of contracts and obligations is wider), the states of fact which the law protects for a person and the rights related thereto are usually the following, though there are a few kinds of wrongs generally, though perhaps improperly, classed as torts where the impairment of other states of fact constitutes the violation of right. (1) The person's own condition, which is covered by the right of personal security, which may be divided into the sub-rights of life, bodily security, liberty, reputation, mental security (to a limited extent), and perhaps privacy. (2) The condition of certain other persons connected with him, *e. g.*, his wife, child or servant, and services due him from them. Rights in those may for convenience be called potestative rights. (3) The possession and physical condition of corporeal things, which are the contents of normal property rights. (4) Cer-

tain conditions of fact which are usually described as relating to incorporeal things, which form the contents of what may be called abnormal property rights, *e. g.*, franchises, patent rights, rights in trademarks. (5) A person's pecuniary condition, the total value of his belongings. For these last I posit a separate right, which may be called the right of pecuniary condition. It is violated by depriving the person of any value which he already has (*damnum emergens*), and in some cases by preventing him from acquiring a gain which he would have acquired (*lucrum cessans*). The violation of any other right, and also the depriving a person of a right, which is a different thing from the violation of a right, or imposing a duty or liability upon a person, imports pecuniary loss and therefore a violation of this right. This right of pecuniary condition has not generally been recognized in our law as a separate right. It is usually considered as embraced in the right of property. Sometimes the expression "property which a person has a special right to acquire" is used. It is, however, important to distinguish between the two rights, especially because the duties which correspond to them are very different. The right of property relates to the possession and physical condition of specific things; the right of pecuniary condition to value. If a thing is injured and its value is thereby depreciated, both rights are violated. But the physical condition of a thing may be changed, and thereby the right of property in it violated, without any depreciation of its value, even with an increase in its value, as where a person embroiders upon another's piece of silk or builds a house on another's land, both of which may be torts.

Thirdly, it is not enough to make a wrong that there should be a breach of duty and a violation of right, though both of those elements are essential. The duty and the right must correspond to each other. There is no general rule as to what duties correspond to what rights. Some duties correspond to many rights, some to but few; some rights have many duties corresponding to them, some few. Speaking generally, duties of actuality and probability usually correspond only to rights of personal security (with some exceptions), potestative rights (with some exceptions), and normal property rights; duties of mere intention, to rights of personal security, potestative rights, and both normal and abnormal property rights; while duties of malice and fraud correspond to

those rights and also to the right of pecuniary condition. But that statement is only approximately correct. For example, a life insurance company cannot have an action against a person who negligently kills one of its policy-holders; but it can, if the killing is done with a malicious intent to cause a loss to the company. The company has no potestative right in the life of the insured; the only right of its which is violated is the right of pecuniary condition. In case of a negligent killing, the only duty broken is a duty of due care, of probability, which does not correspond to the right of pecuniary condition; but if the killing is malicious, a duty of malice is broken, which does correspond to that right. So in a state where a mortgage is considered to be a mere hypothecation, not giving the mortgagee any property right in the land, it has been held that the mortgagee cannot have an action against a third person for a merely negligent, or even an intentional, injury to the land, even though his security is thereby impaired; but he can for an injury done with a malicious intent to injure his security.¹

Fourthly, to make a wrong the breach of duty must be the actual cause and, fifthly, the proximate cause of the violation of right. It can be the actual cause without being the proximate cause.

All the above mentioned five elements are absolutely essential to a wrong; if any one of them is wanting, there is no wrong. Any damage that may have followed the act is *damnum absque injuria*. There is a complete actionable wrong as soon as all those five elements are present, though there may be no actual damage. But after the wrong is complete as a wrong, it may give rise to further injurious consequences for which a recovery can be had in an action for the wrong. Those consequences will be called in this article consequential damage. In its ordinary legal use the expression consequential damage may include the very violation of rights that is an element in the wrong, if that is only an indirect consequence of the act. But as here used it denotes damage that is not included in the wrong itself, but is additional to and consequent upon it. Consequential damage need not be a violation of any right to which the duty broken corresponded, *e. g.*, in an action for a merely negligent injury to a person or to property a resulting pecuniary loss may sometimes be recovered for as consequential damage.

¹ Van Pelt v. McGraw, 4 N. Y. 110 (1850). But some courts allow the mortgagee an action, considering that he has a protected right in the land.

The question of the proximate consequences must be distinguished from several other questions that have often been confounded with it. The reason why contributory negligence will defeat an action has often been said to be that the plaintiff's negligence makes the injury only a remote consequence of the defendant's negligence. If that is the correct view of the matter, then that particular case of remoteness is *sui generis* depending upon its own principles, and has no bearing on the general nature of proximate consequences.

The question of the proximate consequences of a given consequence cannot arise, or at least can have no practical importance, until it has first been made to appear that all the other elements of a tort are present. Courts have sometimes decided against a plaintiff on the ground that the damage to him was not the proximate consequence of the defendant's act, when the actual case was that some other element of a tort was lacking. Such decisions cannot be relied on as authorities on the question of proximate consequences. Sometimes the defendant's act was not a breach of duty at all. This kind of confusion is especially likely to arise when the defendant's duty was a duty to use care. Such a duty, as has been explained, is a duty to act with reference to the consequences that may probably follow the act; and, as will presently be explained, probability means a reasonable probability, consequences which are not reasonably probable may be disregarded by the actor, even though they can be foreseen as possible. If a duty of this sort exists not to expose another to damage, the danger must be an unreasonably great one. Now, as will hereafter appear, proximate consequences also sometimes depends upon probability. Therefore it is possible to confound the two probabilities, and in a case where the probability of harm was not sufficient to create any duty in respect to it, to say that the harm, if it has actually happened, was not a proximate consequence of the act. For example, a passenger was rightfully put off from a railroad train for misbehavior. He was drunk, but not so drunk as to be helpless. Shortly afterwards he was run over by another train. The railroad company was held not liable. The court said that even if after being put off he was in some danger, there was no unusual danger, no more than to any one who might be in the vicinity of the track, and that the injury to him was not the proximate consequence of the conductor's act in ex-

pling him.² This plainly means that it was not negligent, *i. e.*, not unreasonably dangerous, to put him off as was done, and therefore the conductor, having an unquestioned right to put him off in a proper manner, had been guilty of no breach of duty. The question whether the injury to him was a proximate consequence of the conductor's act did not properly arise at all. Even if it had been proximate, the company would not have been liable. So damage has been said to be remote, because the court thought that no right of the plaintiff had been violated.³ The same has been said when the real case was that it did not sufficiently appear that the conduct complained of was actually the cause of the consequence at all, or even that any such consequence had actually happened or, where a claim has been made for future or prospective damage, that it really would happen. Of course, if a certain consequence is not the consequence of a certain alleged cause at all, it is not a proximate consequence of it. But the questions of actual cause, which is always one of pure fact, and of proximate cause, which may be a question of law, are quite distinct. It must appear that the cause has actually produced the consequence, or will actually produce it, before the question of the proximate cause of that consequence can be raised at all. This covers many cases where damage has been held remote because it was too uncertain or speculative, but not all such cases.

When the duty broken did not correspond to the right violated, this has often been expressed by saying that the damage was remote. This is the reason usually given for holding that a life insurance company cannot recover against a person who negligently kills one of its policy-holders. As has been explained, the true reason is want of correspondence between the duty and the right. Such damage in fact might be proximate, if the test of proximate cause were probability, as in such a case many courts would hold it to be. If the actor knew that the life of the person who was endangered by his negligent act was insured, a loss to the insurance company might be a probable, and therefore a proximate, consequence of the act. In *Anthony v. Slaid*,⁴ the plaintiff had contracted with a town to support certain paupers and supply them with neces-

² *Railways Co. v. Valleley*, 32 Oh. St. 345 (1877).

³ *Lamb v. Stone*, 11 Pick. (Mass.) 526 (1831).

⁴ 11 Metc. (Mass.) 290 (1846).

saries for a fixed sum. The defendant committed a battery upon one of the paupers and injured him, whereby the plaintiff was put to expense for his care. It was held that the plaintiff had no cause of action against the defendant. The court said that the damage to the plaintiff was remote. It may really have been remote, but would have been probable had the defendant known of the contract. Really the case was one of want of correspondence between the duty and the right. The plaintiff had no potestative right in the pauper, and the only right of his violated was the right of pecuniary condition, to which the duty broken did not correspond. Had the person injured been the plaintiff's wife, in whose bodily security he had a potestative right, the damage to him would have been proximate. The expense to which he would have been put by performing the duty to take care of his wife, to which he would have been subject because of the marital relation, would have been consequential damage proximate to the violation of his potestative right in her. But his expense for the pauper was not necessarily remote because his duty was imposed by contract rather than by a marital relation. The question of its proximateness did not properly arise at all; that question was never reached, the other necessary elements of a tort not being present.

There are three, and only three, tests of proximateness, namely, intention, probability and the non-intervention of an independent cause.

Any intended consequence of an act is proximate. It would plainly be absurd that a person should be allowed to act with an intention to produce a certain consequence, and then when that very consequence in fact follows his act, to escape liability for it on the plea that it was not proximate.

Probability has the same meaning here as in connection with duties of probability, where the duty is to act or not to act in a way that will probably produce certain consequences. It is a name for some one's opinion or guess as to whether a consequence will result. In fact consequences follow causes according to invariable laws. To a sufficiently comprehensive intelligence everything would be certain, nothing merely probable. It is only because we have not knowledge of events, that are in themselves fixed and certain, that we have to consider probabilities.

The person whose opinion is taken is a reasonable and prudent man in the situation of the actor. The situation consists of such

facts as are known to the actor at the time of the act, including those facts of which he is charged with knowledge or deemed to have constructive knowledge. It would be unjust to require a person to act with reference to facts which were unknown to him or, when probability is the test of his liability, to hold him responsible for happenings which, with the use of proper attention, he could not foresee as probable. It follows that the probability of a consequence must be taken as at the time of the act. A probable consequence is one that to a reasonable and prudent man, having such knowledge as the actor had at the time of the act, would then have seemed probable. Of course, it is assumed that such a man gives proper consideration before acting to the possible consequences of his act. Probability is a matter of degree, ranging all the way from moral certainty to bare possibility. For legal purposes probability means a reasonable probability, or what amounts to the same thing in cases of tort, an unreasonably great probability, *i. e.*, such a probability as would deter a reasonable and prudent man in the actor's situation from doing the act. It has been laid down a hundred times that negligence, *i. e.*, conduct that amounts to the breach of a duty of probability, consists in doing something that a reasonable and prudent man in the actor's situation would not do. There are some consequences of conduct which in a given case, though they might be recognized as possible and therefore as having a certain degree of probability, are so unlikely to happen that a reasonable and prudent man would disregard them and not allow the chance of their happening to influence his conduct. We cannot go through life without continually taking some risks of injuring ourselves or others. All that the law requires is that we shall not take unreasonably great risks. Reasonable probability does not mean a preponderance of probability. In order that a consequence shall be legally probable, it is not necessary that it be more likely to happen than not.

In order that a consequence shall be probable it is not necessary that the precise consequence that actually happens in all its details should have been probable, nor that it should be connected with its cause by the precise chain of causation that was probable. It need only be of such a general character as might reasonably have been foreseen. The following examples will illustrate this. Owing to the negligence of a railroad company, it was probable that a cer-

tain train would be derailed somewhere on a certain stretch of track. A person rightfully on the track stepped off and stood by the side of the track to let the train pass. It happened to be derailed just at that point, and he was hurt. The injury was held to be probable,⁵ though the odds against the train's being derailed at that particular point and any one's being there at the time were thousands to one.

The defendant's carriage was negligently driven into the plaintiff's, and the plaintiff was hurt. The collision was a gentle one; and the defendant claimed that such an injury was not a probable consequence of a gentle collision. The consequence was held proximate; it was a probable consequence of a collision.⁶

The defendant set fire on his own land in such circumstances that it was negligent, *i. e.*, unreasonably dangerous, because of the probability that it would spread to the plaintiff's land. It did so spread, and damaged the plaintiff's property. The damage was held a probable consequence of the defendant's act, though the fire was communicated by sparks carried by the wind, a mode of communication that could not reasonably have been foreseen.⁷

If injury to a person or thing in a particular place or situation is probable; and it is probable that there will be some person or some thing in that situation, and a specific person or thing is injured, the injury will be probable, though it was very improbable that that particular person or thing would be there. If a person discharges a gun in the direction of a crowd of people, where he will probably hit some one, and hits John Doe, one of the crowd, the injury to John Doe is not improbable because the actor reasonably believed that John Doe was not there. If a township leaves a bridge without a guard rail, and a horse takes fright and backs off the edge, the injury is not improbable because it could not be foreseen that that specific horse would do so. It was probable that some horse would.⁸ There may, however, be some particular classes of persons or things, *e. g.*, trespassers or licensees, whose presence in a place is not probable.

There are many special rules as to the probability of certain kinds of consequences or of consequences which are connected with the cause in certain ways, which cannot be mentioned here. The fact

⁵ *Mobile, J. & K. C. R. R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360 (1908).

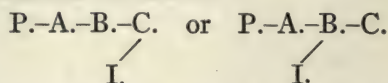
⁶ *Armour & Co. v. Kollmeyer*, 161 Fed. 78 (1908).

⁷ *Higgins v. Dewey*, 107 Mass. 494 (1871).

⁸ *Yoders v. Amwell*, 172 Pa. St. 447, 33 Atl. 1017 (1896).

that a consequence is partly due to the coöperating wrongful or negligent conduct of the person injured or of a third person may or may not make it improbable; such conduct may be a thing that should have been foreseen and allowed for.

The third test of proximateness is the non-intervention of an independent cause between the original cause and the consequence in question. When such a cause intervenes and thus makes the consequence remote, it may be considered to have the effect of legally isolating the principal cause, the cause whose proximateness is in question, from the consequence. Therefore it will be convenient to call it an isolating cause. Some special kinds of isolating causes will be mentioned in connection with the definitional consequences of peremptory duties a little further on. The question here is as to the ordinary meaning of an isolating cause. The principal cause seldom or never produces the consequence directly, but through a chain of intermediate causes, each of which is a consequence of the preceding one and a cause of the next. The principal cause, P., produces a consequence, A. A. produces B., and B., in turn, produces the consequence in question, C. This may be represented thus: P.-A.-B.-C. Intermediate causes, A. and B., are never isolating causes, because they are themselves consequences of P. All the authorities agree that an isolating cause must be an independent cause, *i. e.*, independent of the principal cause, not produced by it. This may be represented as follows:



It is plain, however, that the mere fact that a coöperating cause is an independent cause is not enough to make it an isolating cause, because there are always independent causes coöperating. No consequence that ever happens is the result of a single cause or the end of a single sequence of causation. It is always the meeting place of many such sequences.

An isolating cause must be an active efficient cause, the operation of some active agency, not merely some condition of things which makes it possible for the principal cause to produce the consequence.⁹

⁹ *Simmonds v. New York & N. E. R. R. Co.*, 52 Conn. 264 (1884); *Wallace v. Standard Oil Co.*, 66 Fed. 260 (1895); *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911 (1882).

At least that is the general rule, which, however, is perhaps subject to some exceptions.

It is said that an isolating cause must be a sufficient or superseding cause. This does not mean that it must be the cause of the consequence so as to exclude the operation of the principal cause, or that it must be sufficient in itself to produce the consequence without the principal cause or had the principal cause never existed. In that case the alleged principal cause would not be the cause of the consequence at all, and no question of proximate cause could arise, as has been explained. I have not found or been able to deduce from the authorities any clear and exact definition of what a sufficient cause means. Perhaps it means one that, having in fact been set in operation and operating as it did, produced the consequence without any further active coöperation of the principal cause, the principal cause having merely had the effect of bringing the injured person or thing within the range of operation of the intervening cause. Sometimes the courts speak of the principal cause's having exhausted itself or ceased to operate. Perhaps, however, no precise rule can be laid down, and the question must be put in the general form; what in good sense and reasonableness must be considered the real effective cause? In other words, would it be on the whole just and reasonable to hold the actor responsible for a consequence of his conduct that would not have happened but for the intervention of such a cause?¹⁰

It has been considered that the intervening cause must have been one whose intervention was improbable, so that the consequence was not a probable consequence of the principal cause. But the converse is not true; the fact that a consequence was improbable does not necessarily show that, when it has happened, it was due to some isolating cause.

It has been said that an intervening cause cannot be deemed to be an isolating cause, unless it is due to some one's volition,¹¹ or that when an injury is brought about by a complicated state of affairs, the last conscious agency must be taken as the proximate cause.¹² But it is believed that those statements go too far, that there may be an isolating cause not due to human volition or

¹⁰ *Merrill v. Los Angeles Gas & E. Co.*, 158 Cal. 499, 111 Pac. 534 (1910).

¹¹ *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N. W. 1012 (1910).

¹² *Hartley v. Rochdale*, [1908] 2 K. B. 594.

agency, and that on the other hand the intervention of a conscious agency will not always and necessarily isolate a prior cause.

It must be admitted that the foregoing discussion of the nature of an isolating cause is very unsatisfactory. The matter has been involved in some confusion by the court's having sometimes failed to distinguish between cases where probability and where the absence of an isolating cause was to be taken as the test of proximateness, and applying to one case principles that were appropriate rather to the other. There is no doubt, however, that intention or probability is not always the test of proximateness, and that when it is not, the intervention of an independent active cause will sometimes make a consequence remote and sometimes will not, *i. e.*, that such a cause may or may not have the effect of an isolating cause, however hard it may be to find a precise rule or rules for deciding when it has such an effect. In some particular cases there are special rules that cannot be discussed here. The following examples may throw some light on the subject.

By the defendant's negligence gas escaped into a room. The plaintiff, not knowing of the danger and therefore being free from contributory negligence, went into the room with a light, and was hurt by an explosion of the gas. That was held a proximate consequence of the defendant's negligence; his act was not an isolating cause.¹³

A passenger was wrongfully put off of a railroad train at a distance from his station in a dangerous place. He started to walk to his station, and when he had nearly reached it, and had extricated himself from the danger, he turned and walked back through a tunnel, where he was run over by a train. That was held a remote consequence of the wrongful expulsion. His act was an isolating cause.¹⁴

The defendants' vessel by the negligence of the master and crew ran onto a shoal three-fourths of a mile from the plaintiff's sea wall. Because of a high wind and strong tide, her crew lost control of her, and she drifted onto the wall and damaged it. The defendants were held liable. The wind and tide were not isolating causes.¹⁵

¹³ *Dominion Natural Gas Co. v. Collins*, [1909] A. C. 640.

¹⁴ *Gwyn v. Cincinnati, N. O. & T. P. R. Co.*, 155 Fed. 88 (1907).

¹⁵ *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204 (1870).

The defendant wrongfully sold liquor to a man, which made him drunk. While drunk he killed his wife and then committed suicide. His son was allowed to recover against the defendant for causing the death of his parents. The man's act was not an isolating cause.¹⁶

The defendant sold to a child cartridges for a toy pistol, which was forbidden by statute. The child left the pistol with a cartridge in it lying on the floor of a room, and a second child in playing with it shot and killed the first child. That was held a proximate consequence of the act of selling.¹⁷

A railroad company carried a passenger, a young woman, to a wrong station and put her off there, where she had to wait for a train to take her to her station. While she was waiting, a man who got off at the station where she was committed rape upon her. That was held only a remote consequence of the company's wrongful conduct.¹⁸

The conductor of a freight train which ran on to a siding to let a passenger train pass on the main track ought to have closed the switch leading to the siding, but negligently omitted to do so. Therefore the passenger train ran onto the siding and ran into the freight train. The engineer of the passenger train, had he looked, would have seen that the switch was open. It was held that the negligence of the engineer, not that of the conductor, was the proximate cause of the collision.¹⁹

A fire insurance company, having a right to cancel a policy, sent a telegram to cancel it. By the negligence of the telegraph company the message was missent and did not reach the insured till after the building had been burned, for which loss the company became liable. It was held that the missending, not the fire, was the proximate cause of the loss to the company. Here the loss consisted in being subjected to a liability. The fire would not have caused that had the policy not been in existence. Therefore the fire, though an independent active cause, was not a sufficient cause.²⁰

In a case of tort the question of proximate cause may arise as to the

¹⁶ *Neu v. McKechnie*, 95 N. Y. 632 (1884).

¹⁷ *Binford v. Johnston*, 82 Ind. 426 (1882).

¹⁸ *Sira v. Wabash R. R. Co.*, 115 Mo. 127, 21 S. W. 905 (1893).

¹⁹ *Louisville & N. R. Co. v. Wene*, 202 Fed. 887 (1913).

²⁰ *Providence W. Ins. Co. v. Western Union Tel. Co.*, 247 Ill. 84, 93 N. E. 134 (1910).

definitional consequences of the duty, as to the violation of right, or as to consequential damage. Different tests of proximateness may be applicable in different cases.

When the duty is peremptory, as has been explained, there is no breach of duty at all unless the definitional consequences actually happen, and intention or negligence is not necessary to a breach. It is plain that intention or probability cannot be the test of the proximateness of such consequences. To make that the test would practically amount to abolishing the class of peremptory duties.

It is still a disputed point whether intention or negligence is necessary to a trespass. Assuming that it is not, that the duty is really peremptory, all the authorities agree that inevitable accident will excuse the actor. The precise meaning of inevitable accident, when that expression is not used, as it sometimes is used, to denote the mere absence of intention or negligence, is hard to define. But whatever its precise meaning, it includes the intervention of an isolating cause. The test of proximateness here is, therefore, the non-intervention of an isolating cause — what will for convenience be hereafter called the isolation test. This is one of the cases mentioned above where the conception of an isolating cause is special. It is not clear that any intervening cause which would satisfy the general definition of an isolating cause would amount to inevitable accident.

The duty not to remove the support from land and cause it to fall is also a peremptory duty. If an excavation causes land to cave in, it makes no difference whether or not that consequence was intended or probable. But it must be proximate. It is believed that it will be proximate unless it is caused by the intervention of the act of God or *vis major*. Here, too, the test of proximateness is the isolation test, but the isolating cause is of a special character and must amount to the act of God or *vis major*. It is believed that what is said of this last mentioned duty applies to peremptory duties generally, *e. g.*, to the duty to prevent an actively dangerous thing which a person keeps in his possession, such as a vicious dog or an artificial collection of water, from doing harm, in places where such duties are really peremptory. In all the above mentioned cases of peremptory duties, it is quite possible to treat the cases where the party subject to the duty is excused from liability because the injury was due to inevitable accident, etc., as falling under exceptions to

the duty, and not as cases of remoteness at all. If so, then it must be said that all definitional consequences of peremptory duties are proximate, that no question of proximateness can arise as to such consequences. There are peremptory duties where even the act of God will not excuse, if the definitional consequences in fact happen, such as the duty of a person who is holding another's chattel *in mora* to protect it from injury or to restore it forthwith.

With duties of probability and intention, though, as has been said, there can be a breach of the duty without the definitional consequences actually happening, there can be no actionable wrong. To make a wrong the probable or intended consequences must actually be produced. If an act which is a breach of such a duty causes a violation of right which is not a definitional consequence of the duty or a consequence of such a consequence, there is not a sufficient correspondence between the duty and the right to make a wrong, irrespectively of any question of proximateness.

For instance, there is a duty of probability which, as defined, so to speak, *in genere*, is a duty not to do negligent, *i. e.*, unreasonably dangerous, acts. As so described, it corresponds to rights of bodily security and is owed to all persons. But if A. is shooting with a rifle at a target, and B. is standing close to the target, so that there is an unreasonably great probability that he will be hit, but no one else is apparently in any place of exposure, that generic duty, when it becomes operative and specific in the particular case, takes the form of a duty not to shoot in that direction. It is owed *in specie* only to B. and corresponds *in specie* only to his right. If now C. is lying concealed in the long grass behind the target, where he will probably be hit, but A. does not know that, then although *in genere* the duty is owed to all persons and corresponds to all persons' rights, yet *in specie* the duty is not owed to C. and does not correspond to his rights. The definitional consequence of the duty as it actually exists *in specie* on that particular occasion, is injury to B., not to C. If A. shoots, and does not hit B., but does hit C., he is guilty of a breach of duty toward B. but not of a tort to him, but toward C. there is no breach of duty at all, because the duty did not correspond *in specie* to any right of his. The injury to him was not a definitional consequence of the duty not to shoot. Therefore, no question arises whether the injury to C. was a proximate consequence of A.'s act.

The definitional consequences of duties of probability being probable consequences, it follows that that same probability is the test of their proximate. The definitional consequences of such a duty, when they actually happen, are necessarily consequences that were probable and therefore proximate; and no other consequences are proximate to the act, except further consequences of those definitional consequences, the proximate of which will be discussed below.

To the principles just stated there is perhaps an exception. When a negligent act consists in setting in operation an active dangerous agent, and is a breach of duty because that agent will probably do harm of a certain kind to persons or things within the range of its activity, such harm to such persons or things being the definitional consequence of the duty *in specie*, it has been held that if the activity of the agent extends further than was probable, and causes injury of such a kind to a person or thing outside of the probable field of its activity, so that such injury was in fact improbable and not a definitional consequence of the duty in the particular case, such injury must nevertheless be treated as standing on the footing of a definitional consequence. The duty must be deemed to have corresponded to the right so violated, and the injury to be proximate to the act.

A railroad company negligently set fire to some dry hedge clippings on its own land. The fire ran five hundred yards across a stubble field to the plaintiff's house and burned it. A verdict for the plaintiff was sustained.²¹ Some of the judges thought that the injury to the house was probable. On that view the case presents no difficulty. One judge dissented on the ground that the injury was not probable. But several of the judges said that the company would be liable even though it was not probable that the fire would run so far, if the company had been negligent in starting the fire. The company, of course, had a right to set fire to the clippings, which were its own property, and might have done so intentionally. Negligence here must therefore have meant that the act was unreasonably dangerous because of the probability that the fire would spread to neighboring land. The duty not to set fire to the clippings, a duty of probability, was undoubtedly owed to the owners of all land

²¹ *Smith v. London & S. W. Ry. Co.*, L. R. 5 C. P. 98, 39 L. J. C. P. 68, L. R. 6 C. P. 14, 40 L. J. C. P. 21 (1870).

to which the fire would probably spread, and corresponded to their rights. Injury to them would undoubtedly have been proximate. But a recovery by the plaintiff, if the injury to him was not probable, could be supported only on the ground of an exception to the general rule such as is now under consideration. The language of the judges, however, suggests that they did not distinguish between the definitional consequences of the duty and further consequences of them, which further consequences some courts, as will presently be explained, have held to be proximate though not probable. A similar decision was made in a case where the defendant shot and wounded a dog, and the infuriated animal did damage outside of the probable area of his activity; and the court said explicitly that a person who sets a dangerous thing in action is liable even for improbable consequences.²²

When a building has been negligently set on fire and the fire has spread to neighboring buildings, some courts have held the damage to the latter remote on grounds of humanity, saying that to hold a negligent person liable for a whole conflagration would be to impose a too crushing liability.²³ Such decisions have no bearing on the general theory of proximate consequences. Other courts have refused to follow any such principle, and various distinctions have been drawn. On the whole the cases respecting the spread of fire must perhaps be regarded as *sui generis* affording little guidance for other kinds of cases.

In duties of intention all the definitional consequences of the duty are intended. Therefore, if any such consequences happen, they are proximate. The same rule applies here as to duties of probability, that to make a tort some definitional consequence of the duty must actually happen, and all further injurious consequences, to be proximate, must be consequences of that definitional consequence. Of course the same act, being done with an intention to injure one person and being therefore a breach of a duty of intention toward him, may be negligent as toward another person, and a breach of a duty of probability as to him. In that case if the latter person is in fact injured, the proximate consequences of the injury to him may depend upon probability, not upon intention.

²² *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898).

²³ *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210 (1866); *Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353 (1870).

If the definitional consequences of the duty broken, having become actual as aforesaid, are themselves such consequences as constitute the violation of right necessary to make a tort, which may be called violative consequences, of course the same tests of proximate apply to them in one aspect as in the other. If A. fires off a gun when that is a negligent act, *i. e.*, is unreasonably dangerous, because of the probability that he will hit B., and B. is hit, the hitting of B. is both the definitional consequence of the duty and the violative consequence. In either aspect it is proximate because it was probable.

But often the violative consequences are not identical with the definitional ones, but follow them as further consequences of the act. If so, in order that they may be proximate consequences of the act, it is necessary, and is sufficient, that they be actually and proximately consequences of the definitional consequences. In considering the proximate of such a violative consequence, the definitional consequence, which more directly produced it, is taken as its cause rather than the act which was its primal cause. The question is: assuming that the definitional consequence actually happens, is such a violative consequence proximate to it? It follows that, if in any case probability is to be taken as the test of the proximate of a violative consequence, the probability of the violative consequence following the definitional consequence is not to be compounded with the probability that the definitional consequence would follow the act. For example: If the probability of the definitional consequence following the act was $\frac{1}{2}$ and the probability of the violative consequence following the definitional one was also $\frac{1}{2}$, then the probability of the violative consequence being produced by the act was at the outset only $\frac{1}{2} \times \frac{1}{2}$, or $\frac{1}{4}$. But in estimating the probability of the violative consequence the definitional one should be taken as certain, *i. e.*, to be represented by unity, the true question being, will the definitional consequence, if it happens, produce the violative one. The probability of the violative consequence therefore should not be taken as $\frac{1}{4}$, but as $1 \times \frac{1}{2}$, or $\frac{1}{2}$. There is very little direct authority for the above rule against compounding probabilities. In fact, numerical calculations of probabilities are seldom made, and generally would not be worth much for practical purposes. However, there are cases where the principle of not compounding the probabilities of suc-

cessive or coöperating causes seems to have been approved. The courts sometimes say that the final consequence of a series, which is held proximate as being probable, was not probable at the outset, that is, would not have been probable if all the probabilities had been compounded, but is probable on the assumption that some intermediate consequence actually happens.²⁴

The question whether a violative consequence was proximate to a preceding definitional consequence which was its more immediate cause, arises in two classes of cases: (1) where the definitional consequence was itself defined relatively, by reference to the violative consequence, and (2) where the definitional consequence was defined absolutely, not by any such reference.

A definitional consequence of a duty may itself be defined as consisting in the existence of some condition of things that in its turn will or may produce a violative consequence, such a causal relation to a violative consequence being of the essence of its nature as a definitional consequence of the duty. This is often the case in duties respecting dangerous things. The mere existence of a dangerous thing may be the definitional consequence of the duty, so that if the dangerous thing be produced, there will be a breach of the duty even though it does no harm. But a dangerous thing means a thing that will probably do harm. The harm, which in case of a tort will be the violative consequence, is a consequence of the existence of the dangerous thing, and is that by reference to which the existence of the dangerous thing is defined as being the definitional consequence of the duty. Thus in a duty to keep a highway safe, the condition of the highway itself, and no more than that, is the definitional consequence of the duty. The duty is not properly defined as a duty not to cause harm to travellers by the highway being unsafe, but simply as a duty to keep it safe. If the highway is allowed to remain in an unsafe condition, the duty is broken. But the probability of harm to travellers, which would be a violation of the right to which the duty corresponds, is what makes a given condition of the highway an unsafe condition.

When the definitional consequence is defined relatively by reference to a probable violative consequence, the same principles apply between those two consequences as between the act and the defini-

²⁴ *Quigley v. Delaware & H. Canal Co.*, 142 Pa. St. 388, 21 Atl. 827 (1891).

tional consequence in a duty of probability. To make a tort, the violative consequence must actually happen, and in order to be proximate it must be probable. The test of proximateness here is probability. If, for instance, a traveller is hurt because of the dangerous condition of the highway, that injury must have been a probable consequence of the highway being in such a condition.

But a definitional consequence may be defined by reference not to its probable, but to its actual consequences, though such cases are rare. If, for instance, A. maintains some thing on his land which sends noxious gases onto B.'s land. The thing is a nuisance; and it is so even though the emission of such gases or their passing onto B.'s land was improbable, *i. e.*, if A. had taken such precautions as would probably prevent the emission of any gases. The duty in such a case, I think, should be defined as a duty not to maintain such a thing, not as a duty not to send gases onto B.'s land. The existence of the thing would be the definitional consequence of the duty, and the passing of the gases onto B.'s land the resultant violative consequence. But the thing would be defined as a thing that would produce such a result. In this case, I believe that the test of proximateness should be the same as for the definitional consequences of peremptory duties, not probability but isolation. If gases actually passed onto B.'s land and did damage there, I think that the damage should not be held remote because it was not probable. In fact, some courts have applied the test of isolation and some of probability.

The defendant bought from the plaintiff a narrow strip of land along a stream, and then built a dam on his own land below. He made an embankment on the strip to protect the plaintiff's land from being flooded, but the water percolated through it and made the plaintiff's land wet. The defendant was held liable, though he had built the embankment with due care and skill, *i. e.*, in such a manner that the percolation was not probable. The court said that the percolation was not due to the act of God, *i. e.*, there was no isolating cause, and was a proximate consequence of building the dam.²⁵ But where the defendants made a cesspool on their own land, from which filth percolated into the plaintiff's land, it was held that

²⁵ *Pixley v. Clark*, 35 N. Y. 520 (1866).

the defendants would not be liable unless that consequence was probable.²⁶

The definitional consequences of a duty may, however, be defined absolutely, not by reference to any further consequences which they in their turn will or may produce, though this is not common when the definitional consequences are not identical with the violative ones. A good example is the duty of a ship to show certain lights at night. No doubt the reason for such a requirement is that the probability of collisions will be thereby lessened. But the duty itself is not defined by any reference, direct or indirect, to such a probability. It is not a duty to show such lights as will make a collision improbable, as reasonable safety calls for, but a peremptory duty to show certain prescribed lights. The mere presence or absence of the lights is the definitional consequence of the duty, a definitional consequence which is defined absolutely. If now a collision happens for want of lights, that is a violative consequence. In this class of cases the test of the proximateness of the violative consequence may conceivably be either probability or isolation. There seems to be no prevailing reason for adopting either one in preference to the other. The nature of the original duty, it is submitted, is not a proper guide to follow. Whether the duty was peremptory not to produce the definitional consequence or was a duty merely to use due care not to produce it, *i. e.*, not to act so as probably to produce it, when it has been in fact produced the breach of duty is complete and finished. What happens afterwards, the violation of the right, is something quite distinct and separate. Nevertheless, it is possible that some courts, overlooking the distinction between the definitional and the violative consequences, have been guided by the analogy of the duty, and when the duty as to the definitional consequence was peremptory and did not depend upon probability, have considered that the violative consequence also need not be probable to be proximate, but when the duty was one of probability, so that the definitional consequence had to be probable, have thought that the violative consequence must also be so. When, although the definitional consequence was not defined by the probability of its causing the violation of the right, that probability was the reason for prescribing such a defi-

²⁶ *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925 (1894).

nitional consequence, for creating just that kind of a duty, that may perhaps be a ground for holding that the violation of right must be a probable consequence of the breach of the duty. On the other hand, when a person actually commits a breach of his duty, when he actually does something which the law, without reference to any further consequences of his conduct, forbade him to do, it may reasonably be considered that he acts at his peril, and there seems to be no good reason why, as a general rule, he should be excused from liability, if another is actually injured by his wrongful conduct, because he could not have foreseen that particular injury. Accordingly, in this class of cases, which, as I have said, are not common, some courts seem to have approved the test of probability and others that of isolation; sometimes both tests are mentioned, and sometimes probability is said to be the test when there was in fact a sufficient isolating cause.²⁷

When a violation of right has happened, so that there is a complete tort which will support an action for at least nominal damages, there may ensue, as has been said, further injurious consequences which may be recovered for in an action for the tort as consequential damage. The violative consequences are never defined by any reference to actual or probable consequential damage, but always absolutely. Therefore the relation between the violation of right and consequential damage is like that between definitional consequences which are defined absolutely and violative consequences which follow them, and what has been said about the latter relation applies here. The consequential damage must be proximate to the violation of right, and through that it will be proximate to the act. If probability is taken as the test of its proximateness, the probabilities must not be compounded, but the probability of the consequential damage must be reckoned on the assumption that the violation of right actually happens. The nature of the duty broken, whether that was a peremptory duty or a duty of probability or intention, is not necessarily or properly any guide to the test of proximateness that ought to be used; and the remark above made that a person who has done wrong may justly be held liable for damage that is not probable, applies with even more aptness here.

²⁷ *Jackson v. Adams*, 9 Mass. 484 (1813); *Cate v. Cate*, 50 N. H. 144 (1870); *Daly v. Milwaukee E. Ry. & L. Co.*, 119 Wis. 398, 96 N. W. 832 (1903).

All that can be said here is that some courts take probability as the test of the proximateness of consequential damage, while other courts apply the isolation test. The difference of opinion here is real, and not merely apparent or verbal, and is irreconcilable. A choice simply has to be made between the two possible tests. However, the general rule that intended consequences are proximate applies to violative consequences and to consequential damage.

In the foregoing very general discussion, some cases of minor importance have been passed by without notice, and even in the cases that have been mentioned a considerable number of special rules whose application sometimes modifies or masks the general principles discussed, have also been omitted.

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THE EVOLUTION OF FEDERAL REGULATION OF INTRASTATE RATES: THE SHREVEPORT RATE CASES

"POWERFUL and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use."¹

"By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."²

The first quotation is from Chief Justice Marshall's opinion in *Gibbons v. Ogden*, the great pioneer decision that defined the commerce clause of our Constitution. That opinion was rendered in 1824. That was ninety years ago. The second quotation is from Mr. Justice Hughes' opinion in the so-called Shreveport Rate Cases decided last June. In the one case, Chief Justice Marshall declared that the State of New York could not grant a monopoly in the use of its navigable waterways. In the other, Mr. Justice Hughes declared that the State of Texas could not maintain rates of transportation, however reasonable in themselves, between points within its boundaries, if these rates were discriminatory against rates ordered by the Interstate Commerce Commission to be maintained between points within and points without the State of Texas. The one decision purports to be warranted by the other.

The language of the two quotations differs only in phraseology. The meaning intended to be conveyed is the same in both. They both affirm in absolutely definite terms the paramount authority

¹ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 222.

² *Houston East & West Texas Ry. Co. v. United States; Texas & Pac. Ry. Co. v. United States*, 234 U. S. 342, 351.

of Congress over interstate commerce. Therefore to the lay mind, and indeed to those lawyers who have not undertaken a close study of the development of our constitutional law through judicial interpretation or judicial amendment (and for the purpose of our subject, of course, it is only with judicial interpretation and judicial amendment that we are concerned, because the commerce clause has thus far escaped all direct modification), it would seem that the construction placed upon this, the most vital clause of our whole Constitution, is no different from the construction placed upon it by the remarkable prescience of Chief Justice Marshall at the time when the Constitution was still in its infancy and railroads, and therefore railroad rates, were things unknown. But is it true that the construction is the same? This question is not capable of an absolutely conclusive answer for the obvious reason that Chief Justice Marshall could not foresee, and therefore his definition cannot be said to apply without qualification to, present-day conditions. This is said, of course, with full appreciation of the well-established principle that the reasons which may have caused the framers of the Constitution to repose the commercial power in Congress, and upon which our early justices necessarily largely relied, do not limit the extent of the power itself.³ Whether Chief Justice Marshall, were he living to-day, would reason as do the members of our present court is a matter of the purest conjecture; but even assuming that he would, the all-important fact remains that during this long period of ninety years agreement has by no means prevailed in the opinions expressed by the Supreme Court from time to time upon the scope of the commerce clause. An analysis of the opinions in the various cases shows widely dissimilar views. Here we will find an expansion of the commerce clause, there a contraction. Each view has a certain historical or economic significance. That there is this variance is by no means unusual. It is but the evolution of this branch of our constitutional law. The questions of police power, taxation, due process and equal protection of the laws, not to mention innumerable other questions, have each, in their turn, been subjected to a similar process of development. These evolutions have been largely con-

³ See *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228 (1899), in which this principle is very forcibly enunciated.

structive, not destructive. They represent a progressive trend of thought, and yet one ever mindful of our government's constitutional limitations. In some cases there were no such convincing precedents as those dealing with the commerce clause upon which to build. Occasionally precedents have been overruled expressly, because found to have been clearly erroneous, or impliedly, because of the stress of economic conditions, — nullification by indirection, if you will. But, for the most part, there has been a more or less successful attempt to square the latest decisions with the fountain heads that have gone before. To this general rule, however, the evolution of the commerce clause, in so far as it relates to the regulation of intrastate rates, is believed to be an exception, and it is the purpose of this article to trace this evolution by an analysis of the decisions which have brought it about.

The evolution of federal regulation of intrastate rates is properly to be traced by dividing the decisions construing the power of Congress over interstate commerce into five periods, each of which is more or less distinctly defined by reason of particular interpretations placed upon the commerce clause. The first period dates from the adoption of the Constitution in 1789 to 1829. This period is noteworthy in that it evolved these two basic principles: First, that the actual regulation of interstate commerce by Congress excludes its regulation by the states. Second, that the power to regulate purely internal commerce rests exclusively with the states regardless of whether they actually exercise this power or not. This period will be called the Constructive Period.

The second period dates from 1829 to 1876, the year of the so-called Granger Cases.⁴ This period is noteworthy in that in addition to upholding the two basic principles of the first period, it gradually evolved, although not without great controversy, a third basic principle, namely, that in matters essentially national in their nature and requiring uniformity of regulation the exclusiveness of congressional power is not dependent upon actual exercise of that power, but arises from the very grant itself of the power; while in matters which, though affecting interstate commerce, are primarily of local interest, the power of the states to regulate is

⁴ *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. R. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. Ry. Co.*, 94 U. S. 164; *Winona & St. Peter R. R. Co. v. Blake*, 94 U. S. 180.

plenary in the absence of congressional action. This latter power is generally, though it would seem rather inaccurately, described as concurrent. The use of the word "concurrent" rather conveys the idea of simultaneous operation of the state and the federal power, whereas the one operates only when the other is not exercised. From the fact that the state power is dominated by, and must give way to, the federal power when exercised, it would seem perhaps more accurate to speak of the one power as *dominant* and of the other as *servient*. This second period will be called the States' Rights Period.

The third period, one of only ten years, dates from 1876 to 1886, the year of the decision in the case of *Wabash, St. L. & P. Ry. Co. v. Illinois*.⁵ The decisions of this period are noteworthy in that they further extend the principle of so-called "concurrent" power to the point of saying that until Congress acts the states themselves may even regulate matters essentially national in their nature, namely, interstate rates, as well as those matters primarily of local interest. This period will be called the Extreme States' Rights Period.

The fourth period dates from 1886 down to but not including the so-called Minnesota Rate Cases,⁶ decided in 1913. During this period the decisions affirm the three principles enunciated in the first and second periods, and repudiate the Extreme States' Rights principle of the third period. This fourth period will be called the Federalistic Period.

The fifth and last period dates from the decision rendered in 1913 in the Minnesota Rate Cases to the present time, and therefore includes the decision in the Shreveport Rate Cases⁷ rendered last June. This period is noteworthy for the further and hitherto unknown restriction of state power. A principle never before announced is now evolved to the effect that state regulation of local rates is exclusive only until Congress acts, or, in other words, that the power of the state is servient not merely in local matters affecting interstate commerce, but in the regulation of its own internal commerce as well. In short, it does not allow the corresponding usurpation to the federal government that was allowed to the states during the third or Extreme States' Rights period, that is,

⁵ 118 U. S. 557.

⁶ 230 U. S. 352.

⁷ 234 U. S. 342.

regulation of intrastate rates until the states themselves regulate them, for of course that would be valueless; but it goes further and proclaims that there may be regulation of intrastate rates by Congress to the exclusion of state regulation whenever Congress may see fit to act. In addition, with the Interstate Commerce Commission, an agent of Congress, be it noted, is primarily vested the determination of this fundamental constitutional question, namely, whether state action is to be excluded, or, in short, whether the commerce clause has been violated. This last period will be called the Period of Judicial Amendment, so radical is it in its extension of the doctrine of national supremacy. The leading decisions of each period will now be considered.

I. THE CONSTRUCTIVE PERIOD

At the time of the adoption of the Constitution, commerce "among the several States,"⁸ to use the exact words of the commerce clause, consisted of touching the circumference of the states by the landing of vessels at coastwise points, and of transportation by land from one state to another, such as it was, by coach or wagon. The penetration and commingling of external and internal commerce is a product of the railroad and so unknown to our forefathers. To use the words of Henry Clay, "The country had scarcely any interior."⁹ While it is believed that by the language used in the Constitution more was in fact actually contemplated than transportation by water,¹⁰ it is quite clear that nothing more was immediately intended, either by the Federal Convention which framed the Constitution or by the state conventions which ultimately gave their approval, than to enable Congress to prevent the imposition of duties by particular states upon articles imported from or through other states. This power

⁸ Article 1, sec. 8, c. 3.

⁹ Speech in House of Representatives, January 30, 1824; *Annals* 18th Congress, 1st Session, Vol. I, pl. 1315.

¹⁰ See *contra*, "Chief Justice Marshall on Regulation of Interstate Carriers," by E. Parmelee Prentice, 5 *COL. L. REV.* 77. Mr. Prentice bases his argument on the fact that states continued to grant monopolies to ferry and canal companies, land transportation companies and even to railroads as late as 1866, when, as we shall see, Congress intervened. See also, by the same author, "The Federal Power over Carriers and Corporations," and "The Origin of the Right to Engage in Interstate Commerce," 17 *HARV. L. REV.* 20.

given to Congress was thought to be merely negative, not affirmative. In short, it was conceded to the federal government, with virtually no debate, as supplementary to the attainment of the greatest object of the new government — destruction of state jealousies with regard to foreign commerce and the abuse of power by the importing states in taxing the non-importing, which had been so detrimental to harmony and progress under the Confederation, and in the place of these the establishment of one rule of uniformity.¹¹

Although Chief Justice Marshall, with his broad discernment, saw the futility of declaring the power to regulate interstate commerce to be merely negative and gave to it at once an affirmative significance, the facts to which he applied his definition were so dissimilar to the facts with which we have to deal, that however broad, however elastic, he may have intended his definition to be, we cannot go beyond a reasonable construction of his words in any case. In *Gibbons v. Ogden* he decided that the laws of New York which granted to the successors of Livingston and Fulton the exclusive right to navigate with their steamboats all waters within the state, for a term of years, was an unconstitutional restriction

¹¹ See Elliott's "Debates on the Federal Constitution"; "The Federalist," Nos. 7, 11, 42; Max Ferrand, "The Records of the Federal Convention of 1787"; "The Framing of the Constitution."

On February 13, 1827, James Madison, writing from his home at Montpelier to his friend J. C. Cabell, remarked in regard to the power of Congress over interstate commerce: "I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it, yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves rather than as a power to be used for the positive purpose of the general government in which alone, however, remedial power could be lodged." *Letters and Other Writings of James Madison*, Vol. 4, pp. 14-15.

Strange as it seems, this was written three years after the decision in *Gibbons v. Ogden*. Madison's successor in the Presidency, James Monroe, actually believed that Congress had no power to make internal improvements by virtue of the Commerce Clause of the Constitution, on the theory that that clause merely gave power to impose duties on foreign trade, and to prevent duties on trade between the states, — or in fact by virtue of any other power granted to Congress. See James Monroe's Message to Congress of May 4, 1822, and accompanying paper on the subject of internal improvements, vetoing the act for the preservation and repair of the Cumberland Road.

of interstate commerce, because it prevented vessels licensed to carry on the coasting trade under the laws of the United States from navigating those waters in the prosecution of that trade.

Difficult as this decision must have been to render as an original proposition, embracing as it did the announcement of national supremacy at the expense of the states, which was the basis of all the opposition to the new form of government, it was, from a judicial point of view at least, not so difficult as the determination of the present-day problems arising out of our complex commercial life and the complete inter-relation of almost all railroad rates. Let us analyze the opinion of Chief Justice Marshall. First, the word "commerce," he said, as used in the Constitution "comprehends, and has always been understood to comprehend, navigation."¹² And whatever conflicts there may have been as to the scope of the commerce clause, he set them at rest by declaring with equal emphasis that it "comprehends every species of commercial intercourse,"¹³ thus paving the way for the application of the commerce clause to railroads, which, however, was not directly utilized, as we shall see, until forty-eight years later. Second, he thus defined the distinction between interstate and intrastate commerce:

"Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal

¹² 9 Wheat. (U. S.) p. 193.

¹³ *Ibid.*, p. 193.

concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself. . . . Commerce among the states must, of necessity, be commerce with the states.”¹⁴

Third, he decided — and this is the real *ratio decidendi* of the case — that a state cannot regulate interstate commerce while Congress is regulating it. Lastly, by declaring that there was an “immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to a general government: all which can be most advantageously exercised by the states themselves,”¹⁵ he adopted the far-seeing views of Daniel Webster (who argued the case for the appellant), which, as we shall see, succeeding justices were slow to grasp, and which gave rise to a stubborn controversy lasting nearly thirty years.

In rendering the court’s opinion, Chief Justice Marshall was mindful of the vast importance and far-reaching effect of the decision, and therefore of the wisdom of not proceeding too far beyond what was necessary for the purposes of the case. “The magnitude of the question,” he said, “the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.”¹⁶

In short, in declaring the power of Congress over interstate commerce to be paramount, he did so with application only to the particular facts of the case, and did not decide, because unnecessary to do so, that the mere grant of this power made it *ipso facto* exclusive. “In discussing the question, whether this power is still in the states, in the case under consideration,” he said, “we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate

¹⁴ 9 Wheat. (U. S.) pp. 194-96.

¹⁵ *Ibid.*, p. 203.

¹⁶ *Ibid.*, p. 222.

commerce with foreign nations and among the states, while Congress is regulating it?"¹⁷

The negative answer given to this question is stated by a masterly course of constructive reasoning in the most positive terms. So from the time of this decision there could no longer be any doubt that when Congress regulates interstate commerce that action is absolutely exclusive. This principle was conclusively affirmed three years later by Chief Justice Marshall in *Brown v. Maryland*,¹⁸ an indestructible precedent, remarkable in its expression, of our constitutional law. An act of the legislature of Maryland, which imposed a license fee of fifty dollars on importers of foreign goods before they could sell them, was held unconstitutional, as violating both the constitutional provision against state taxation of imports and exports and the commerce clause. Chief Justice Marshall said as to the latter: "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons v. Ogden*, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned."¹⁹

This case would seem to set at rest the question, reserved in *Gibbons v. Ogden*, as to whether there was a residuum of equal power vested in the states which might be exercised by them in the absence of congressional action. Nevertheless, confusion seems to have been engendered by a decision handed down by Chief Justice Marshall himself the following year, and with this the States' Rights period may properly be said to begin.

¹⁷ 9 Wheat. (U. S.) 200. It might be argued that the case could have been disposed of simply by declaring that the state action, being in violation of existing acts of Congress, was therefore void by the express language of Article Six of that Constitution.

¹⁸ 12 Wheat. (U. S.) 419 (1827).

¹⁹ *Ibid.*, p. 446.

II. THE STATES' RIGHTS PERIOD

In the case of *Willson v. The Black Bird Creek Marsh Company*,²⁰ the State of Delaware had authorized a company to dam a small navigable tidal creek for the purpose of reclaiming marsh land and improving the drainage of the surrounding territory. The defendants, owners of a sloop licensed as a coaster under the laws of the United States, ran into the dam with the vessel and injured it. In an action for damages the defendants contended that the state law authorizing the building of the dam was an unconstitutional interference with interstate commerce, but Chief Justice Marshall held not, saying:

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states, a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state or as being in conflict with any law passed on the subject."²¹

Unfortunately Chief Justice Marshall makes no mention of the cases of *Gibbons v. Ogden* and *Brown v. Maryland* in this decision, but obviously, from his language just quoted, he intended that nothing that he had said in those cases should be modified. The problem there presented was quite different, and Chief Justice Marshall must be considered as having so viewed it. In *Gibbons v. Ogden* and *Brown v. Maryland* the subject was in its nature national, and therefore admitted of only one uniform system or plan of regulation. In the Black Bird Creek Marsh Company case the subject was primarily of local interest, and in the absence of con-

²⁰ 2 Pet. (U. S.) 245 (1829).

²¹ *Ibid.*, p. 252.

gressional action admitted of state regulation. True, Chief Justice Marshall stated in this case that the state action was repugnant neither to the power to regulate commerce in its "dormant state" nor to any law passed by Congress by virtue of that power, and this at first somewhat confuses the distinction between cases in which congressional jurisdiction is exclusive *per se* and in which it is not. But the language in the rest of the opinion shows that the non-action of Congress was the decisive feature of the case, and that the "dormant state" of congressional power was referred to simply to show that the local regulation was not directed to such a subject as was properly covered by the mere grant of power to Congress. If this explanation is sound, then it must be accepted as answering in the affirmative the question reserved in *Gibbons v. Ogden*, namely, that even if Congress had not legislated, would the New York statute involved in that case have been void from its inception?

Clear as is this distinction now between those subjects over which the power of Congress is exclusive *per se*, and those over which it is merely dominant until put into operation, it was not conclusively enunciated by a majority of the Supreme Court in any case until 1851, or twenty-two years after the decision in the Black Bird Creek Marsh Company Case. During those years the opinions of the court were many times at variance with each other. The cause of this lies, however, not so much in a failure to grasp the distinction which Chief Justice Marshall intended to make, but in the fact that the question of state versus national sovereignty had become much more prominent in the ripening of events which afterwards brought about the Civil War. The personnel of the Supreme Court underwent a great change. Many of its members were advocates of the Extreme States' Rights theory. The battle really began with the case of *City of New York v. Miln*,²² decided in 1837, the first case in which the court was divided in its judgment of the commerce clause, and reached its highest pitch in the License Cases²³ and the Passenger Cases,²⁴ decided in 1847 and 1849. A close analysis of the varied opinions in these three cases would itself fill a book. Suffice it to state briefly the facts and the principles announced.

²² 11 Pet. (U. S.) 102.

²³ 5 How. (U. S.) 504.

²⁴ 7 How. (U. S.) 283.

In *City of New York v. Miln* there was held valid a law of the State of New York requiring, among other things, the masters of all vessels arriving at the port of New York from the ports of other states or countries to make to the state authorities, within twenty-four hours after arrival, a written report containing the name, birth-place, last legal settlement, age and occupation of every passenger to be landed. The law was upheld on the ground that it was a police measure, not a regulation of foreign or interstate commerce, and formed a portion of that "immense mass of legislation which," according to *Gibbons v. Ogden*, "embraces everything within the territory of a state, not surrendered to a general government: all which can be most advantageously exercised by the states themselves."²⁵ The opinion of the court was written by Mr. Justice Barbour, and concurred in by Mr. Justice Thompson in a separate opinion. It is significant that Mr. Justice Story, failing to admit the distinction intended to be laid down by Chief Justice Marshall in *Gibbons v. Ogden* between matters of national and matters of local interest, dissented.²⁶

The License Cases involved the validity of certain laws of the States of Massachusetts, Rhode Island and New Hampshire prohibiting the sale of liquor without licenses previously obtained from the state authorities. The entire court, led by Chief Justice Taney, sustained the validity of the laws, but the members were very much divided as to the reasons upon which the decision should be based. Chief Justice Taney took the position that the state laws were regulations of foreign and interstate commerce in so far as they operated to impose burdens upon the sale in original packages of liquor brought into the state, but he held that the power to regulate such commerce was concurrent, and that, consequently, the laws were valid. Here, again, we see a failure, or at least a refusal, to grasp the distinction between matters which are of national and those of purely local interest. Justice Catron agreed substantially with the Chief Justice. Justices McLean, Grier and

²⁵ 9 Wheat. (U. S.) 203.

²⁶ Mr. Justice Story's argument was that on the first hearing of the case, which was before Chief Justice Marshall, the latter agreed with his views. The case was originally brought to the Supreme Court on a certificate of division in opinion of the judges of the United States Circuit Court for the Southern District of New York. The Supreme Court itself being divided, a re-argument was directed.

Daniel sustained the laws on the ground that they were police measures and not within the prohibition of prior decisions. Justice Woodbury, adopting the same view, went further, however, and declared with Chief Justice Taney that the power to regulate interstate commerce was concurrent. This theory, although not applicable to the facts in these cases, was to a large extent that suggested by Daniel Webster's argument in *Gibbons v. Ogden*, and which, as has been pointed out, is believed to have been intended by Chief Justice Marshall as the proper one. Certainly it approximates the one that has since been adopted by the court, namely, that the federal power over commerce is exclusive in so far as from the nature of the case a uniform regulation is demanded or is appropriate, but that in matters of purely local and particular interest the states may, in the absence of opposing federal statutes, legislate. "I admit," said Mr. Justice Woodbury, "that so far as regards the uniformity of a regulation reaching to all the states, it must in these cases, of course, be exclusive. . . . But there is much in connection with foreign commerce which is local within each state, convenient for its regulation, and useful to the public, to be acted on by each until the power is abused or some course is taken by Congress conflicting with it."²⁷ But Justice Woodbury failed to make the proper classification of subjects. It is strange, in a sense, that any of the Justices could have wandered so far from the irrefutable logic of *Brown v. Maryland*. On the other hand, it must be remembered that they were dominated by a grave political situation, with one party seeking to establish complete national powers for a government which the other party regarded as a mere league of states. The controversy was only ended by civil war. Suffice it to say, however, for the purposes of our present discussion, that the License Cases were squarely overruled by the case of *Leisy v. Hardin*²⁸ in 1890.

In the Passenger Cases there was involved the validity of laws of Massachusetts and New York imposing a tax upon every non-resident passenger landed within the state from every vessel arriving from a port of some other state or country. These laws were very properly held invalid, the court, however, being divided five

²⁷ 5 How. (U. S.) 624.

²⁸ 135 U. S. 100. See *Bowman v. Chicago & N. W. Railway Co.*, 125 U. S. 465 (1888).

to four. All of the Justices who delivered separate opinions in the License Cases delivered separate opinions in the Passenger Cases, as did also Justices Wayne and McKinley. The opinions of the respective Justices in both cases are substantially the same in so far as they bear upon the question of the so-called concurrency or exclusiveness of congressional power.

Here again a great political controversy was carried to the Supreme Court. The problem presented was more troublesome than that in the License Cases. On the one hand, the Constitution gave the citizens of each state the privileges and immunities of citizens of the several states. On the other hand, the Constitution left each state to determine for itself what immigration should be permitted. So far as land communication between the states was concerned, it was generally conceded that the states had never surrendered that power, and it was now urged that passengers by sea had no greater rights within a state than if they had come by land from an adjoining state. Absorbing as is the study of this controversy as exposed in the decisions of the Supreme Court, space does not permit that we pursue it further here.²⁹ Summarizing the notable features of these famous cases, together with the notable features of the License Cases, and viewing them primarily as abstract propositions of constitutional law relating to the commerce clause, as we here must, they are believed to be three in number. First, failure on the part of the members of the court to agree on *any* definition of the commerce power. Second, refusal to agree that the power of Congress was ever exclusive. Third, departure, except on the part of Mr. Justice Woodbury, from the doctrine which must reasonably be inferred from the cases of *Gibbons v. Ogden* and *Black Bird Creek Marsh Company*, and which was soon to be announced as the true rule of construction, namely, that in matters national the power of Congress is exclusive by the very grant, while in matters of local interest the power of the states is concurrent or servient to the dominant power of Congress when that power is exercised.³⁰

²⁹ See *Crandall v. Nevada*, 6 Wall. (U. S.) 35. In this case, decided after the Civil War (1867), the Supreme Court affirmed the right of free passage from state to state, not, however, as a result of the construction of any provision of the Constitution, but because this right was considered essential to the existence and administration of the nation.

³⁰ See an article by Louis M. Greeley, "What is the Test of a Regulation of Foreign

Finally in 1851, in the case of *Cooley v. Board of Wardens*,³¹ the Supreme Court, in an opinion delivered by Mr. Justice Curtis, established once and for all the rule which had been so often threatened with adoption since 1829, but in which a majority of the Justices had never been able entirely to concur. The facts of this case, briefly stated, are that by act of the legislature of Pennsylvania certain requirements were imposed upon the master of every vessel entering the port of Philadelphia to make certain reports to the harbor officials, and upon the failure to comply with these requirements so-called half pilotage fees were exacted. The plaintiff brought an action to recover these fees, claiming that the Pennsylvania law was in conflict with various provisions of the Federal Constitution, among them the commerce clause, with which alone we are here concerned. The court said:

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."³²

Mr. Justice Daniel in a short opinion agreed with the judgment of the court, but not with its reasoning, for he doubted whether this concurrent power in the state "which is deemed indispensable to the safety and existence of every community . . . could, under any circumstances, be surrendered."³³

Mr. Justice McLean filed a very strong dissenting opinion³⁴

or Interstate Commerce?" 1 HARV. L. REV. 159, in which the author states that the only true test taken from Justice Woodbury's opinions is to be found in the intention or purpose of the state legislature in passing each given law. This, of course, is not entirely accurate. But see Thayer's "Cases on Constitutional Law," pp. 2190-91, where this question as to the need for local or national regulation is said to be inherently a legislative and not a judicial one.

³¹ 12 How. (U. S.) 299.

³³ *Ibid.*, p. 326.

³² *Ibid.*, p. 319.

³⁴ *Ibid.*, pp. 321-25.

based upon what he understood to be the dictum of Chief Justice Marshall in regard to pilotage laws as stated in *Gibbons v. Ogden*. Chief Justice Marshall did say in that case that Congress by the act of 1789 had adopted the pilotage laws of the states in order to give them full force and effect, and therefore that Congress had intended to pre-empt the field in so far as the whole question of pilotage was concerned, and that the states were thereafter precluded from passing any law whatsoever on the subject. It must be admitted that Mr. Justice McLean's reasoning is entirely logical and supported by the remarks of Chief Justice Marshall. However, admitting Mr. Justice McLean's dissent to have been justified by the particular facts of this case, there is nothing in his language or in that of Chief Justice Marshall which in any way weakens the correctness of the principle announced by the majority of the court through Mr. Justice Curtis. In short, that principle, while perhaps not applicable to the exact facts in *Cooley v. Board of Wardens*, is nevertheless the true guide. Often there has been great difficulty in obtaining any definite criteria by which to distinguish between the two classes of subjects, but the principle has remained the same to the present day.³⁵

³⁵ The leading cases classified are as follows: pilotage—*Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450 (1864); *Anderson v. Pac. Coast S. S. Co.*, 225 U. S. 187 (1912). Protection and improvement of navigable waters—*Gilman v. Phila.*, 3 Wall. (U. S.) 713 (1865); *Pound v. Turck*, 95 U. S. 459 (1877); *County of Mobile v. Kimball*, 102 U. S. 691 (1880); *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196 (1885); *Escanaba v. Chicago*, 107 U. S. 678 (1882); *Cardwell v. American Bridge Co.*, 113 U. S. 205 (1885); *Huse v. Glover*, 119 U. S. 543 (1886); *Willamette Bridge Co. v. Hatch*, 125 U. S. 1 (1888); *Lake Shore & M. S. Ry. Co. v. Ohio*, 165 U. S. 365 (1897); *Cummings v. Chic.*, 188 U. S. 410 (1903); *Manigault v. Springs*, 199 U. S. 473 (1905). Regulation of wharfage charges or tolls—*Packet Co. v. Keokuk*, 95 U. S. 80 (1877); *Cinn.*, etc. *Packet Co. v. Catlettsburg*, 105 U. S. 559 (1881); *Parkersburg & Ohio River Transportation Co. v. Parkersburg*, 107 U. S. 691 (1882); *Ouachita Packet Co. v. Aiken*, 121 U. S. 444 (1887); *Sands v. Manistee River Imp. Co.*, 123 U. S. 288 (1887). Quarantine regulations—*Hannibal & St. J. R. R. Co. v. Husen*, 95 U. S. 465 (1877); *Morgan*, etc. *S. S. Co. v. Louisiana*, 118 U. S. 455 (1886); *Missouri, Kansas & Texas Ry. v. Haber*, 169 U. S. 613 (1898); *Louisiana v. Texas*, 176 U. S. 1 (1900); *Rasmussen v. Idaho*, 181 U. S. 198 (1901); *Compagnie Francaise*, etc. *v. Board of Health*, 186 U. S. 380 (1902); *Reid v. Colorado*, 187 U. S. 137 (1902); *Asbell v. Kansas*, 209 U. S. 251 (1908). Inspection laws—*Turner v. Md.*, 107 U. S. 38 (1882); *Plumley v. Mass.*, 155 U. S. 461 (1894); *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345 (1898); *Silz v. Hesterburg*, 211 U. S. 31 (1908); *Savage v. Jones*, 225 U. S. 501 (1912). Laws governing nonfeasance or misfeasance of interstate carriers—*Sherlock v. Alling*, 93 U. S. 99 (1876); *Johnson v. Chic.*, etc. *Elevator Co.*, 119 U. S. 388 (1886); *Smith v. Ala-*

At this point it is proper to pause and consider for a moment what is the direct bearing that the principles, the development of which we have just traced, have upon the ultimate regulation by Congress of intrastate rates. All of these principles, it may be objected, were evolved from cases relating to water transportation. True, but at the very beginning Chief Justice Marshall defined the commerce clause as comprehending "every species of commercial intercourse."³⁶ The fact that railroads had not become important in our commercial life at the time these decisions were rendered should not be used as an argument that they are not fully applicable to railroads. And so the Supreme Court held, as soon as it was required to do so. The first real occasion arose in 1872 (although the court had dodged the question five years earlier),³⁷ in the case of the State Freight Tax,³⁸ where it was held, Mr. Justice Strong writing the opinion of the court, that a state tax upon interstate freight was in violation of the commerce clause.³⁹ "Beyond all question the transportation of freight," he said, "or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. . . . Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the Constitution was adopted."⁴⁰

In view of the broad, sensible definition that had been given to

bama, 124 U. S. 465 (1888); *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646 (1896); *Louisville & Nashville R. R. Co. v. Ky.*, 161 U. S. 677 (1896); *Hennington v. Georgia*, 163 U. S. 299 (1896); *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628 (1897); *Chic., Milwaukee, etc. Ry. Co. v. Solan*, 169 U. S. 133 (1898); *Lake Shore & Mich. Southern Ry. Co. v. Ohio*, 173 U. S. 285 (1899); *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477 (1903); *Northern Securities Co. v. United States*, 193 U. S. 197 (1904); *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284 (1906); *The Winnebago*, 205 U. S. 354 (1907); *Missouri Pac. Ry. Co. v. Larabee Mills*, 211 U. S. 612 (1909); *Missouri Pac. Ry. Co. v. Kansas*, 216 U. S. 262 (1909); *Davis v. C., C. C. & St. L. Ry. Co.*, 217 U. S. 157 (1910); *Martin v. West*, 222 U. S. 191 (1911); *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1 (1912); *Adams Express Co. v. Croninger*, 226 U. S. 491 (1913); *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59 (1913); *Southern Pac. Co. v. Schuyler*, 227 U. S. 601 (1913).

³⁶ 9 Wheat. (U. S.) 193.

³⁷ *Crandall v. Nevada*, 6 Wall. (U. S.) 35.

³⁸ 15 Wall. (U. S.) 232.

³⁹ See in this connection, *State Tax on Railway Gross Receipts*, decided at the same term, 15 Wall. (U. S.) 284.

⁴⁰ 15 Wall. (U. S.) 275.

the commerce clause, it is difficult to understand that any one should have attempted to exclude land transportation while including water transportation. As a matter of fact, counsel for the state in the State Freight Tax Case did resort to a somewhat more subtle method of reasoning, to the effect that the use of the word "regulate" in the commerce clause presupposed merely a rule to govern intercourse, and the tax in question was argued not to be a rule.⁴¹ The real reason, of course, for such refinements and differences over what are now axiomatic, is the fact that railroads were still a new thing, and laws necessarily experimented with them, just as engineers experimented with the development of the mechanical and other phases of transportation before obtaining the desired results. How little the National Government had really awakened to its power over these great arteries of commerce is emphasized by the fact that as late as 1866 Congress felt the necessity of declaring by statute that every railroad had the right by virtue of the commerce clause to carry from state to state whomever and whatever it pleased and to receive compensation therefor. The validity of this statute was confirmed seven years later.⁴²

III. THE EXTREME STATES' RIGHTS PERIOD

We have now traced the development of the commerce clause in the light of the leading cases up to approximately the year 1876. In that year began what may properly be known as the Extreme States' Rights Period in so far as the commerce clause is concerned, because it is noteworthy as the date of a number of cases which announced a principle hitherto unknown and exceeding in the extension of state power all principles that had previously been announced. The cases are: *Munn v. Illinois*,⁴³ *Chicago, B. & Q. R. R. v. Iowa*,⁴⁴ *Peik v. Chicago & N. W. Ry. Co.*,⁴⁵ and *Winona & St. Peter R. R. v. Blake*.⁴⁶ The question in each of these cases was, briefly stated, whether the authority of the state to limit by legislation the charges of common carriers within its borders was confined to the power to impose limitations in connection with grants of

⁴¹ 15 Wall. (U. S.) 250-52.

⁴² *Chic. & N. W. Ry. Co. v. Fuller*, 17 Wall. (U. S.) 560 (1873).

⁴³ 94 U. S. 113.

⁴⁴ *Ibid.*, p. 155.

⁴⁵ *Ibid.*, p. 164.

⁴⁶ *Ibid.*, p. 180. See also *Chicago, M. & St. P. R. R. Co. v. Ackley*, 94 U. S. 179; *Stone v. Wisconsin*, 94 U. S. 181.

corporate privileges. The court held not, and declared that the carriers were subject to legislative control as to the amount of their charges, except when protected by contract with the state. The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin and Minnesota, passed in the years 1871 and 1874 in response to a general movement for a reduction of rates. The section of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with state lines. This section had begun to feel the reaction and possibilities of development following the Civil War. In the first of these cases, *Munn v. Illinois*, the court did not have before it railroad rates, but grain elevator charges in Chicago. Through these elevators the grain from seven or eight western states was accustomed to pass *en route* to the East. Besides denying the state's legislative authority to limit these charges, it was urged that the act of Illinois violated the commerce clause. But the court, through Chief Justice Waite, in an opinion replete with learning, and notable for its extension of the doctrine of "public interest," declared otherwise. In the *Munn Case*, and also in each of the railroad cases that followed, the court decided that intrastate rates were a matter purely of state concern. Had the decisions rested here there would have been nothing unusual about them, but in the railroad cases the opinions went further, and declared that not only may a state regulate the purely intrastate business of a railroad, but that until Congress acts in reference to its interstate rates, the state may regulate them also. The expressions of opinion in each case on this point are short and admittedly received but little consideration, and have to a large extent therefore been considered as dictum. But assuming this to be true, since they have recently been adopted, as we shall presently see, as the basis for a most radical principle, the inevitable consequences of their announcement are too far-reaching to permit of mere superficial comment. Let us consider the exact words in each case bearing upon this question of state regulation of interstate rates.

In *Chicago, B. & Q. R. R. Co. v. Iowa* the court said through Mr. Chief Justice Waite, "It [the railroad] is employed in state as well as in interstate commerce, and, until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within

its own jurisdiction, even though in so doing those without may be indirectly affected.”⁴⁷

In *Peik v. Chicago & N. W. Ry. Co.* the Chief Justice again spoke as follows:

“The law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without.”⁴⁸

In *Winona & St. Peter R. R. Co. v. Blake* the Chief Justice rendered merely a very short opinion for the court and stated that the case fell directly within the court’s ruling in the cases just considered.

This new principle was not to survive long, for in 1886 the court had occasion to consider in a very important case the revolutionary effect that the language of the Granger Cases, if sustained, would necessarily have upon the power of Congress to regulate interstate commerce. As we have seen, in the second or States’ Rights Period, which began in 1829 and ended in 1876 with these cases, the principle was developed of a dormant congressional power in local matters which when exercised meant the exclusion of state power from the same subject, but never had any of the cases gone to the extent of saying that in matters the regulation of which from their very nature rested in Congress, the states could interfere in the absence of Congressional action. In short, the Granger Cases represent not simply an extension of the principle of concurrent power finally established by the case of *Cooley v. Board of Wardens*, but amount in effect to an overruling of that first and fundamental principle which we found to have been foretold, if not actually established by *Gibbons v. Ogden*, namely, that the power of Congress in those matters requiring uniformity of regulation because national in their nature was exclusive from the very grant of the power, and was not dependent upon actual exercise of the power.

⁴⁷ 94 U. S. 163.

⁴⁸ *Ibid.*, pp. 177-78.

IV. THE FEDERALISTIC PERIOD

It was in *Wabash, St. L. & P. Ry. Co. v. Illinois*⁴⁹ that the court hastened to retract from its position maintained in the Granger Cases, and while emphatically maintaining that there was no question of the state's authority to regulate rates for transportation wholly intrastate, such authority went no further. In this case there was before the court a statute of Illinois which enacted that if any railroad company should charge or receive for transporting passengers or freight of the same class within the state the same or a greater sum for any distance than it did for a longer distance in the same direction, it should be liable to a penalty for unjust discrimination. The defendant railroad made such discrimination in regard to goods transported from Peoria, Illinois, and from Gilman, Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer to the city of New York than the latter, this difference being in the length of the lines in the State of Illinois. The court held the statute invalid as a regulation of interstate commerce. Mr. Justice Miller, in delivering the opinion of the court, expressed some doubt as to whether the Illinois court's construction of the statute was correct in making it apply to commerce among the states, but said that the Supreme Court was bound by that construction.

Continuing, he explained that of the members of the court who had concurred in the dictum of the Granger Cases, there being two dissentients, but three remained, and that he, as one of them, was prepared to take his share of the responsibility. Then, after a thorough, analytical discussion of various cases⁵⁰ that had been decided since the Granger Cases, showing the radical language of the latter to have been at least indirectly repudiated, the court concluded:

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of the majority of this court that a statute of a state

⁴⁹ 118 U. S. 557 (1886).

⁵⁰ See *County of Mobile v. Kimball*, 102 U. S. 691 (1880); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885); *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34 (1886); *Stone v. The Farmers' Loan & Trust Co.*, 116 U. S. 307 (1886).

which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law."⁵¹

It is difficult to see any error in this decision, although three Justices dissented. There can be no questioning the fact that the rate sought to be regulated was an interstate rate. Obviously, if such transportation is not to be treated in its entirety, but as divisible by each state, then there would be not only utter confusion in rate-making, but the power of Congress over interstate commerce would be absolutely vitiated.

Pursuing our chronological consideration of cases, we find that by this time it had become a rather common practice for the states to create commissions, as agencies of state supervision and regulation, with rate-making power.⁵² It is not necessary to analyze the numerous cases that defined this power. It is sufficient to name the more prominent ones in which the principles again established by the Wabash Case were reaffirmed: *Dow v. Beidelman*,⁵³ *Reagan v. Farmers' Loan & Trust Co.*,⁵⁴ and *Reagan v. Mercantile Trust Company*.⁵⁵

The effect of intrastate rates upon interstate rates was seriously urged in *Smyth v. Ames*,⁵⁶ a case especially noteworthy as first announcing the true doctrine of due process of law, as required by the Constitution, in relation to railroad rates. Mr. Justice Brewer heard the cases in the lower court, and his pronouncement of the plenary powers of the states over their own local rates (the only phase of the case with which we are here concerned) was affirmed in the highest court by Mr. Justice Harlan.

Fourteen years later, however, trouble arose. In the case of *Louisville & Nashville R. R. Company v. Eubank*⁵⁷ the long and short haul clause of the Kentucky constitution was in issue. It had just been held in the same year in the case of *Louisville & Nashville R. R. Co. v. Kentucky* that this same section of the Kentucky constitution when applied to places, all of which were within the state, violated no provision of the Federal Constitution. But in

⁵¹ 118 U. S. 575.

⁵² See, for a summary of this legislation, *Interstate Commerce Commission v. Cinc. N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495-500 (1897).

⁵³ 125 U. S. 680 (1888).

⁵⁴ 154 U. S. 362 (1894).

⁵⁵ *Ibid.*, 413.

⁵⁶ 169 U. S. 466 (1898).

⁵⁷ 184 U. S. 27 (1902).

the Eubank Case the facts were these: The defendant railroad exacted a rate of twenty-five cents per one hundred pounds on tobacco from Franklin to Louisville, both in Kentucky, and at the same time exacted on the same product from Nashville, Tennessee, to Louisville, over the same line, a rate of only twelve cents per one hundred pounds on account of water competition. The court held that the clause of the Kentucky constitution which forbade the railroad company to continue exacting a rate from Franklin to Louisville higher than the rate from Nashville to Louisville was void as a direct regulation of the interstate rate, namely, the rate from Nashville to Louisville, because for business reasons such a requirement would necessarily lead the company to raise its rate from Nashville rather than to reduce its rate from Franklin. In delivering the opinion of the court Mr. Justice Peckham said that the Wabash Case was not exactly in point, and yet, after a most minute analysis of it, he made it the real basis of the decision. He said:

"Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville and asks the defendant to carry it. It responds that it would like to carry it at the rate of twelve cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that state, which would entail a loss in the business between those points, which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the state to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the state? If it be, is not the law which accomplishes this result a direct interference by the state with interstate commerce? And if it do not lower its state rates and in consequence must raise its interstate rates, in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the state, of that commerce which ought to be free therefrom?"⁵⁸

⁵⁸ 184 U. S. 40.

In this case, from the very language of the proviso in the Kentucky constitution, there is obviously a closer approach to the direct regulation by the state of both the intrastate and interstate rates than in any case that we have previously considered. But even so, there is a clear distinction between the Eubank Case and the Wabash Case, and the failure of the court to give more weight to it has led to a decision which is believed to be open to much question, and which, as we shall see in a subsequent consideration of the Minnesota and Shreveport Cases, is largely responsible for the Supreme Court's announcement of a principle which it is impossible to defend by precedent. The distinction between the two cases is simply this: The rate sought to be regulated by the Kentucky constitution was an intrastate rate, while in the Wabash Case the rate sought to be regulated by the Illinois statute was an interstate rate. But what of the effect, it will be asked, upon the interstate rate that the regulation of the intrastate rate in the Eubank Case caused? This is admirably discussed in Mr. Justice Brewer's dissenting opinion, in which Mr. Justice Gray concurred. Mr. Justice Brewer said:

"But if a state may select as a standard the interstate rates prescribed by Congress and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the state respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the state when like action by Congress in the exercise of its constitutional power does not. . . .

"I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce by simply saying that outside of the state it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing. . . .

"It seems to me, in conclusion, that a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it

legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard — the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment.”⁵⁹

It is a significant fact that until the Minnesota Rate Cases, decided in 1913, the Eubank Case was referred to by the Supreme Court only once,⁶⁰ and in several comparatively recent cases it would seem to have been virtually overruled — certainly the dissenting views of Justice Brewer were more nearly adopted.

The most apposite of these cases is *Missouri Pacific Ry. Co. v. Kansas*.⁶¹ There the question was whether a railroad company could be compelled by a mandamus from the state court to obey an order of the Kansas Board of Railroad Commissioners requiring it to operate a passenger train between a point within the state and the state line. The road in question extended from Madison, Kansas, to Monteith Junction, Missouri, eighty-nine miles of it being in Kansas and nineteen miles in Missouri. There were no terminal facilities at Monteith Junction and the trains did not remain over at that point, but were run three miles further on in the State of Missouri to Butler Station. In holding that the order did not impose a direct burden upon interstate commerce when construed in accordance with its necessary effect, Chief Justice White said:

. . . “But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Atlantic Coast Line v. Wharton*, 207 U. S. 328.”⁶²

Note the significant words used “at the mere election of the corporation.” Similarly in the Eubank Case the effect on the interstate rate complained of by operation of the long and short haul clause of the Kentucky constitution, that is, the raising of the inter-

⁵⁹ 184 U. S. 45-49.

⁶⁰ *Ohio R. R. Com. v. Worthington*, 225 U. S. 101, 107.

⁶¹ 216 U. S. 262 (1910).

⁶² *Ibid.*, 284.

state rate to a parity with the local rate, was "at the mere election of the corporation," for the intrastate rate could have been lowered to a parity with the interstate rate, and would it "necessarily result that thereby a direct burden on interstate commerce would be imposed"?

From the date of the decision of the case of *Missouri Pacific Ry. Co. v. Kansas* just referred to, and the decision in the Minnesota Rate Cases, only three years elapsed. During that time the Supreme Court rendered no decision of particular significance in connection with the question with which we are here concerned, namely, the extension of federal power from the well-defined field of interstate commerce into the equally well-defined field of intrastate commerce. We have seen that while in the Eubank Case the reaction from the Granger Cases took this trend, in the *Missouri Pacific Ry. Co. v. Kansas* the pendulum again swung back, and from all that appears in the cases immediately following this decision one would not expect any radical departure from it. But there was such a departure, and in order to fully understand it, it is necessary to bear in mind two factors which are believed to be of very vital significance. These factors are, first, the crisis which had been reached in the excessive interrelation or overlapping of intrastate and interstate rates; and, secondly, the great change in the personnel of the Supreme Court at this time. It had fallen to the task of President Taft to appoint a Chief Justice and five new Associate Justices, Mr. Chief Justice Fuller, Associate Justices Brewer, Harlan and Peckham all having died, and Mr. Justice Moody having retired, within a short space of time. With the passing of these men, most of the more conservative thought passed also from our highest court, and there began with the new blood an era of the most dominant federalism.

V. THE PERIOD OF JUDICIAL AMENDMENT

This new period, which we have called the period of Judicial Amendment, began with a reconstructed court in 1913, with the Minnesota Rate Cases. The facts in these cases are briefly as follows: The state line of Minnesota on the east and west runs between cities which are in close proximity, that is, there are various twin cities, such as Superior, Wisconsin, and Duluth, Minnesota;

Grand Forks, North Dakota, and East Grand Forks, Minnesota, which, on account of their situations, had always been accorded by the railroad companies serving them like rates in and out. In 1905 and 1906 the State Railroad and Warehouse Commission of Minnesota, pursuant to acts of the state legislature, ordered reduced the class rates on general merchandise twenty and twenty-five per cent, and corresponding reductions were made in commodity and passenger rates. Simultaneously with this compulsory reduction of intrastate rates, the railroads involved, namely, the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis and St. Louis Railroad Company, in order to prevent discrimination against localities and the consequent loss of business, reduced to a parity their interstate rates to the corresponding twin cities in each group lying outside the State of Minnesota. Whereupon the stockholders of these roads brought suit to restrain the enforcement of these acts of the legislature and orders of the Commission. The stockholders' contentions were: First, that the newly established rates amounted to an unconstitutional interference with interstate commerce; second, that they were confiscatory; and third, that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law in violation of the Fourteenth Amendment. The lower court sustained the latter contention, which was affirmed by the United States Supreme Court on appeal, the penal and criminal provisions only of the statutes being considered.⁶³ The lower court then referred the suits to a special master, who took the evidence and made an elaborate report sustaining the complainants' other contentions. The master's findings were confirmed by the United States Circuit Court for the District of Minnesota (Judge Sanborn) and decrees were entered accordingly.⁶⁴ From these decrees the Attorney-General of the state and the members of the State Commission appealed to the Supreme Court. Appreciating the gravity of the controversy, the railroad commissioners of eight

⁶³ *Ex parte Young*, 209 U. S. 123 (1908). Although the rate provisions of the statute were left unsettled so far as the question of interference with interstate commerce was concerned, Mr. Justice Peckham, in rendering the opinion, took occasion to remark (p. 145) that "the question is not, at any rate, frivolous."

⁶⁴ 184 Fed. 765 (1911).

states⁶⁵ filed their brief as *amici curiae*, as did also the governors of three states,⁶⁶ pursuant to a resolution of a conference of the governors of all the states.

The question of the validity of state acts and orders fixing maximum rates was thus presented in two distinct aspects: (1) with respect to their effect on interstate commerce, and (2) as to their alleged confiscatory character. With this second aspect we are not here concerned, and for the purposes of our inquiry the rates fixed by the state will be assumed to be reasonable so far as intrastate traffic is concerned (as they were in fact for the most part found to be by the Supreme Court), that is, rates which the state in the exercise of its legislative judgment could constitutionally fix for intrastate transportation separately considered. With respect to the branch of the cases with which we are here concerned, namely, the effect of these rates upon interstate commerce, the decree of the lower court which was under review was shown to rest upon two distinct grounds: First, that the action of the state imposed a direct burden upon interstate commerce; and second, that it was in conflict with the provisions of the act to regulate commerce.

As to the first proposition, namely, that the action of the State of Minnesota in prescribing new and lower intrastate rates thereby imposed a direct burden upon interstate commerce, the conclusion of the Supreme Court that it did not must be accepted as sound. But the qualification placed by the court, without a dissenting vote to be sure, upon the state's authority over intrastate rates is believed to contain an enunciation of congressional power which was not only unnecessary for the decision in these cases, but which has no support in former decisions, and which, furthermore, if acted upon in future instances, may give rise to an alarming conflict between state and federal interests detrimental to the preservation of our dual form of government.

"Was the state," asks Mr. Justice Hughes, "in prescribing a general tariff of reasonable intrastate rates otherwise within its authority, bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the state power, independently of federal legislation,

⁶⁵ Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas.

⁶⁶ Ohio, Nebraska and Missouri.

is thus limited, the inquiry need proceed no further.”⁶⁷ The court declares that the state power is not so limited because, as we have seen, Chief Justice Marshall indelibly wrote upon our constitutional jurisprudence in the case of *Gibbons v. Ogden*, that the completely internal commerce of a state is reserved for the state itself. But, adds the court:

“This reservation to the states manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *M’Culloch v. Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith v. Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 619; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Mondou v. New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55.

“The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Ex parte McNeil*, 13 Wall. 236, 240;

⁶⁷ 230 U. S. 397-98.

Welton v. Missouri, 91 U. S. 275, 280; *County of Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Bowman v. Chicago, etc. Railway Co.*, 125 U. S. 465, 481, 485; *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 103, 104; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 378; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 436.

"The principle, which determines this classification, underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."⁶⁸

Considering first those subjects which require a general system or uniformity of regulation and over which therefore the power of Congress is exclusive, the court cites a great number of cases, of which the leading ones have already been referred to in this article, maintaining the freedom of interstate commerce from all modes of direct interference by the states, the most typical example of which being, of course, taxation in its varied forms.

The court then proceeds, by an exhaustive digest of cases, to consider those matters admitting of diversity of treatment according to the special requirements of local conditions, wherein, as we have seen, by virtue of the principle of so-called concurrent powers developed during the States' Rights period, 1829 to 1876, the states may act within their respective jurisdiction until Congress see fit to act. Whereupon the court, with a directness and brevity that is almost startling, asserts, "These principles apply to the authority of the state to prescribe reasonable maximum rates for intrastate transportation."⁶⁹ But do they? It is believed that an affirmative answer finds no support in any decision of the Supreme Court. Herein lies the radicalism and, it is believed, also the weakness of the court's opinion. The remarkable prescience of the members of the court is doubtless responsible for this inconsistency. At least it is difficult of explanation in any other way than by saying that the Justices foresaw, and feared, the economic difficulty that would inevitably arise in the almost immediate future had they dismissed the cases with an opinion that the power

⁶⁸ 230 U. S. 399-400.

⁶⁹ *Ibid.*, 412.

of the states over intrastate rates was unqualifiedly plenary within their given sphere. They fully realized that new physical conditions had produced the anomaly of a double action of legislative powers upon business which is, and which should be, economically speaking, a unit and under the control of one body, the national government. They appreciated the gravity of the situation, and saw that some measure was unquestionably needed to relieve the business of transportation from the confusing and destructive dominance and jealousies of numerous state commissions, whereby effective authority on the part of the Interstate Commerce Commission was vitiated. So, as it seems, constructive statesmanship absorbing their minds at the expense of a more narrow, yet a more correct judicial course of reasoning, they vaulted the difficulty and dismissed the question as having been settled by prior decisions, after a short, unconvincing analysis of those decisions, — unconvincing because in none of the cases cited by the court, and it is believed in none others that have been decided, do we find any enunciation of the doctrine that the power of the states over intrastate rates is servient to the power of Congress over interstate rates. On the contrary, all of the decisions assert that the state's power is and always has been, since the adoption of the Constitution, unqualifiedly plenary within its own sphere. This must be true from the very character of our dual form of government. The power to tax, as Chief Justice Marshall said, is the power to destroy, so the federal government cannot tax state instrumentalities,⁷⁰ and *vice versa*, a state may not tax the instrumentalities of the federal government.⁷¹ This is all that Chief Justice Marshall meant when in *Brown v. Maryland* he said:

"That which is not supreme must yield to that which is supreme."⁷²

Similarly, while the treaty power, which is vested in the President and the Senate, is supreme, it may not be so arbitrarily extended as to usurp other powers granted either to the federal

⁷⁰ *The Collector v. Day*, 11 Wall. (U. S.) 113 (1870). But see also *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533 (1869); *South Carolina v. United States*, 199 U. S. 437 (1905).

⁷¹ *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819); *California v. Central Pac. R. R. Co.*, 127 U. S. 1 (1888).

⁷² 12 Wheat (U. S.) 448.

government or to the states. It may be abused, to be sure, yet this is not usurpation. A colorable exercise of a power is not a valid exercise of a power, and, therefore, just as a treaty must be confined to those matters which are properly subjects for international, not internal, negotiations, just so must the exercise by Congress of its power over interstate commerce be confined to matters which are actually within the domain of interstate commerce. Congress cannot under the guise of this power usurp other fields of governmental regulation, whether belonging properly to the states or to the federal government. A few years ago, in a case involving the reclamation of arid lands in the West, the federal government claimed the paramount right to control the waters of the Arkansas River to aid in the reclamation of these lands. But the court, in a masterly opinion by Mr. Justice Brewer, turned a deaf ear to the alluring argument of expediency and denied this right, saying:

“The preamble of the Constitution declares who framed it, ‘we the people of the United States,’ not the people of one state, but the people of all the states, and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. . . .

“At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their

reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised." ⁷³

True, in the case just referred to, the court was not called upon to construe express language of grant, but rather of restriction. But correct constitutional interpretation must necessarily be the same in both directions, as is explained in this case, namely, liberal construction, yet at the same time fidelity to both the spirit and purpose of the instrument.

Let us consider in more detail the cases relied upon in the Minnesota opinion to establish the principle of a dominant federal and a servient state power over intrastate rates. The first cases considered by the court are the Granger Cases. We have already analyzed the language of these cases when they were considered under the Extreme States' Rights Period, and we found that the *dormant* power referred to in all of them was the *dormant power of Congress over interstate* commerce, for the question was whether the states could regulate this commerce in the absence of congressional regulation, and *not*, as in the Minnesota Cases, *whether Congress could ever regulate intrastate* commerce. Obviously the questions are totally different. This part of the decisions in the Granger Cases, is, as we have seen, and as the court in the Minnesota Cases points out, no longer law because soon repudiated in the case of *Wabash, St. L. & P. Ry. Co. v. Illinois*. "But," said Mr. Justice Hughes in referring to this case, "no doubt was entertained of the state's authority to regulate rates for transportation that was wholly intrastate." ⁷⁴ More than this, Mr. Justice Miller, in delivering the opinion of the court, and in repudiating the doctrine of the earlier cases that until Congress acted, the states might regulate interstate commerce, used these words: "Though it is true that . . . the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the states, was presented, it received but little attention at the hands of the court, and was passed over with

⁷³ *Kansas v. Colorado*, 206 U. S. 46, 90-92 (1907).

⁷⁴ 230 U. S. 415.

the remarks in the opinions of the court which have been cited.”⁷⁵ All of these remarks have been quoted. This principle received *no* attention at the hands of the court in the Wabash Case. How then can any of these cases be properly considered as authority, in even the slightest degree, for the principle of a dominant federal and a servient state power as announced by Mr. Justice Hughes?

From the remaining case relied upon by the court in this branch of its opinion, namely, *Stone v. Farmers' Loan and Trust Co.*, one of the so-called Railroad Commission cases, to which reference has already been made in this article, Mr. Justice Hughes quotes the following language, affirming the plenary power of the state over its internal commerce and giving no suggestion that this power is servient to Congress: “It [the state], may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.”⁷⁶

So much for the cases relied upon by the court in the first part of its opinion. In the second part of its opinion, wherein the scope of the Interstate Commerce Act is discussed (which we shall consider later), numerous other cases of similar import are cited, but in none of them is language found which in any way qualifies the principle that the state's power over intrastate rates is plenary. “The decisions of this court since the passage of the act to regulate commerce,” says Mr. Justice Hughes, “have uniformly recognized that it was competent for the state to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority.”⁷⁷ Then follows an analysis of decisions, all of which confirm in unmistakable terms the plenary power of the states.⁷⁸

⁷⁵ 118 U. S. 569-70 (1886).

⁷⁶ 116 U. S. 307, 334 (1886).

⁷⁷ 230 U. S. 423.

⁷⁸ *Ibid.*, 423-33. It must, in fairness, be admitted that the principle of the Minnesota decision seems to have been predicted, with little reasoning, however, in one or

Transportation is wholly within a state or it is not. There can be no doubt as to the separability. The adjudications by the Supreme Court dealing with the question of when an interstate shipment ceases to be such and becomes intrastate, and also with the taxation of the gross receipts of carriers are entirely sufficient to set at rest any doubt on this point.⁷⁹ Clearly, if intrastate business is separable from interstate business, so must intrastate rates be separable from interstate rates, because rates are the symbol of business. They are the receipts which are declared separable for the purpose of taxation. If separable for that purpose, why are they not equally separable for the purpose of regulation? Suppose, for example, a railroad doing *solely an intrastate* business, operating in and out of the same terminals, as another railroad engaged *solely in interstate* business. Suppose, further, that the former road, in order to get the business of the latter, by fostering certain intrastate localities, greatly reduces its rates to these localities, which the interstate road either does not reach, or if it does, then only by an interstate route. Can it be denied that the economic necessity thus imposed upon the latter road to reduce its rates in order to meet the competition of the former is clear and direct? Yet can there be any question whatsoever as to the complete separability and independence of the two railroads, and therefore of their respective businesses? Suppose, further, that the state itself elected to construct and operate the purely intrastate railroad, instead of merely regulating it under private ownership. Could not the state have put into effect any rates that it chose, provided only they were not so exorbitant as to be confiscatory to the public? Certainly, and no authority, upon com-

two opinions of courts of inferior jurisdiction, and by one or two authors. See especially *Woodside v. Tonopah & G. R. Co.*, 184 Fed. 358; "Congress and Intrastate Commerce," 9 COL. L. REV. 38, by David W. Fairleigh. Mr. Fairleigh bases his argument on the theory of agency, which is unconvincing, and unsupported by authority.

⁷⁹ See three articles by the author, "Constitutional Limitations upon State Taxation of Foreign Corporations," 11 COL. L. REV. 393; "The Commerce Clause and Intrastate Rates," 12 COL. L. REV. 321; "The Vanishing Rate-making Power of the States," 14 COL. L. REV. 122. See also *United States Express Co. v. Minnesota*, 223 U. S. 335; *Atchison, etc. Ry. Co. v. O'Connor*, 223 U. S. 280; *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298; *Bacon v. Illinois*, 227 U. S. 504; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665; *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; *Gulf, Colorado & S. F. Ry. Co. v. Texas*, 204 U. S. 403; *Ohio R. R. Commission v. Worthington*, 225 U. S. 101.

plaint that interstate rates were thereby affected, could have called it to account. If such would be the position of a state operating its own intrastate lines, wherein lies the difference when it authorizes a corporation, as its creature and agent, to perform the same function?

It may be asked, why may not Congress regulate intrastate rates, if it may require, as the Supreme Court has decided,⁸⁰ the use of safety appliances on purely intrastate trains? The reason is that while interstate and intrastate rates may be interdependent for economic or geographical reasons, this is not the same direct interdependence that necessarily exists between trains or cars operated over the same tracks. A rate is a charge for, not an instrument of transportation. Of course, physical interdependence is not *per se* the one and only criterion by which we determine whether or not the necessity for uniformity is real or potential, but this much we must find, namely, that the exercise of state authority, whether it be regulatory of rates, hours of labor, employers' liability, the equipment or inspection of rolling stock, or what not, necessarily impinges upon and burdens in a relatively immediate way the full exercise of federal authority. We do so find in the case of safety appliances, because of the direct connection between the equipment used in the two kinds of traffic. There is an inseparable interdependence of the very objects of the legislation.⁸¹ But the court did not, nor can it find the same relation between interstate and intrastate rates. Why then, if these two classes of rates are separable, should the court say that the action or non-action of Congress is the controlling factor? If these two classes of rates are separable, the power of the state over the intrastate rates must be plenary and exclusive, not servient, unless we do violence to the very words of the Constitution and to that long line of decisions, beginning with *Gibbons v. Ogden*, which have just been analyzed.

The decision in *Southern Railway Co. v. United States*, the safety-appliance case, just referred to, clarifies, when properly analyzed,

⁸⁰ *Southern Railway Co. v. United States*, 222 U. S. 20 (1911). See also *Southern Railway Co. v. Crockett*, 234 U. S. 725.

⁸¹ A somewhat kindred situation arose in the car distribution cases. See *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452 (1910); *Baltimore & Ohio R. R. Co., ex rel. Pitcairn Coal Co.*, 215 U. S. 481 (1910); *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304 (1913).

the distinction which, it is believed, underlies the Minnesota Cases. In every case cited by the Supreme Court to prove the principle that the plenary nature of the state's power depended upon the non-action of Congress, *the legislation in question operated directly upon the instrumentalities of interstate commerce or upon the very subject-matter of interstate commerce itself*. Herein lies the distinguishing feature which the court seems disposed to overlook. The character of the legislation clearly shows this: pilotage regulations, protection and improvement of navigable waters, regulation of wharfage charges or tolls, quarantine regulations, inspection laws, laws governing nonfeasance or misfeasance of interstate carriers. These involve no question of regulation by a state of a purely internal matter, but rather the regulation by a state of matters on their face interstate, and therefore governed, as we have seen, by the principle of concurrent powers. It was over these very matters that the controversy, out of which finally emerged the principle of concurrent powers, was waged for many years, and the whole basis of the controversy was the fact that these matters were *interstate*.

A case not referred to by the court, *Interstate Commerce Commission v. Goodrich Transit Company*,⁸² may seem at first blush to bridge the gap between the cases referred to, and to establish a precedent for the court's reasoning in the Minnesota Cases. In that case it was held that the Interstate Commerce Commission could compel an interstate carrier to disclose the records of all its business, including that which is purely intrastate. In answer to the argument that this was an unconstitutional usurpation of power by the federal government, the court replied that "the requiring of information concerning a business is not a regulation of that business."⁸³ Similarly, the court had previously held that because an injury to an interstate employee might be inflicted by a purely intrastate employee, the second federal employers' liability act covering such a case was not thereby invalid as a regulation of intrastate commerce, because, as the court said, it is a mistaken theory "that treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power."⁸⁴

⁸² 224 U. S. 194 (1912).

⁸³ *Ibid.*, 211.

⁸⁴ The Second Employers' Liability Cases, *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 51 (1912).

In other words, it was again the instrumentality of interstate commerce, a human instrumentality in this case, that the act directly concerned, and that only. The first federal employers' liability act was declared void⁸⁵ for the very reason that it comprehended the regulation of matters wholly intrastate, — the employment of persons engaged wholly in intrastate commerce, — in short instrumentalities of such commerce. If this is forbidden, wherein lies the distinction upon which to base the opinion of the court in the Minnesota Cases that Congress may regulate the rates of such commerce?

Turning now to a consideration of the further question whether the action of the State of Minnesota was repugnant to any provision of the Interstate Commerce Act, the court in the Minnesota Cases also answered this in the negative, by demonstrating that purely intrastate commerce had always been expressly excepted from the operation of the act by the proviso contained in the first section. "The fixing of reasonable rates for intrastate transportation was left," said the court after giving a history of the act, "where it had been found; that is, with the states and the agencies created by the states to deal with that subject. *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 620, 621."⁸⁶ Thus far the court's reasoning is clear, succinct and eminently sound. When pressed, however, with the more troublesome argument that the provisions of Section 3 of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, applied to an unreasonable discrimination between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively, the court reserved its opinion, in accordance with its prior rulings,⁸⁷ because the Interstate Commerce Commission had made no finding in regard to the Minnesota rates, and no action

⁸⁵ *Employers' Liability Cases*, 207 U. S. 463 (1908).

⁸⁶ 230 U. S. 421.

⁸⁷ *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1906); *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481 (1910); *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506 (1912); *United States v. Pacific & Arctic Co.*, 228 U. S. 87 (1913). See also *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1912); *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184 (1913); *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247 (1913); *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 304 (1913).

of that body was before the court for review. However, as we shall see, this question was not to be reserved for long.

The court again proceeded with an analysis of cases which we have earlier considered, in order to confirm the principle that after the passage of the Interstate Commerce Act, just as before, the state continued to possess that state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic.

In concluding, the court reverted to its theory, expressed earlier in the opinion, of a dominant federal and a servient state power, and virtually said that the Interstate Commerce Act might be amended without amending the Constitution so as to include specifically the regulation of intrastate rates.

"If the situation has become such," said the court, "by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should apply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."⁸⁸

Of what real value could it be to declare that, in so far as the reasonableness *per se* of local rates is concerned, the present Interstate Commerce Act necessarily forbids, by express proviso, any interference by the federal government, when at the same moment it is declared with greater emphasis that this power of the states over their local rates is supreme *only until Congress acts*? This indeed pointed the way to destruction of state power. And the way was not a difficult one. In fact it proved to be shorter than it seemed from the court's language. The Interstate Com-

⁸⁸ 230 U. S. 432-33.

merce Commission, ever zealous for greater authority, anticipated the opinion of the Supreme Court on the question that was reserved in the Minnesota opinion, and within a year from the rendering of that opinion has, it is believed, in the Shreveport Cases ⁸⁹ virtually accomplished without any additional legislation whatsoever all that that opinion pointed out might be done only by additional legislation. State regulation of intrastate rates seemed doomed by the Minnesota Cases, but certainly its death was not expected to come so soon. Let us see what are the facts in the Shreveport Cases and exactly what the court decided.

In 1911 the Railroad Commission of Louisiana filed a petition with the Interstate Commerce Commission against the Texas & Pacific Railway Company, the Houston East and West Texas Railway Company, and various other carriers, the basis of the complaint being that the carriers made rates out of Dallas and other Texas points into eastern Texas, which were much lower than those which they extended into Texas from Shreveport, Louisiana. Shreveport is about forty miles from the Texas state line, and two hundred and thirty-one miles from Houston, Texas. It is one hundred and eighty-nine miles from Dallas. It competes with both Houston and Dallas for the trade of the intervening territory. The rates from Dallas and Houston, respectively, eastward to intermediate points in Texas, were much less, according to distance, than from Shreveport westward to the same points. It was undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. Such was the frank purpose of the Texas commission. For example, the rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents per hundred pounds, while the rate from Shreveport to Longview, 65.7 miles, was 35 cents.

The order of the Interstate Commerce Commission had two phases. First, it established maximum class rates out of Shreveport to certain-named Texas points, which were substantially the same as the class rates which had been fixed by the Texas Commission and charged by the carriers for transportation for similar distances within the State of Texas. Second, the Commission held that maintaining lower commodity rates (which are specially re-

⁸⁹ 234 U. S. 342.

duced class rates) from Dallas and Houston to points in Texas than were in force from Shreveport to such points, under substantially similar conditions and circumstances, created an unjust discrimination against Shreveport in favor of the Texas points.⁹⁰ The carriers complied with the first part of the order and established the class rates, but still left in effect their low intrastate commodity rates which the Commission declared caused the above discrimination. The point of objection to complying with the second part of the order was that, since the discrimination found by the Commission to be undue arose out of a relation of intrastate rates, maintained under state authority, to interstate rates that had been upheld as reasonable, its correction was beyond the Commission's power. On appeal to the Commerce Court, that court held that the Commission's order relieved the railroads from all further obligation to observe the intrastate rates, and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination.⁹¹ Thus, when the case reached the Supreme Court, the invalidity of the order of the Commission was challenged upon two grounds: First, that Congress is impotent to control the intrastate charges of an interstate carrier, even to the extent necessary to prevent injurious discrimination against interstate traffic. Second, that if it be assumed that Congress has this power, still it

⁹⁰ See *Meredith et al.*, constituting the Railroad Commission of Louisiana *v.* St. Louis S. W. Ry. Co. *et al.*, 23 I. C. C. Rep. 31.

⁹¹ *Texas & Pacific Ry. Co. v. U. S. (Interstate Commerce Commission et al., Interveners)*, 205 Fed. 380 (1913); *Houston East & West Texas Ry. Co. et al. v. United States (Interstate Commerce Commission et al., Interveners)*, 205 Fed. 391 (1913).

The opinion in the Commerce Court was written by Judge Knapp, presiding judge. Judge Mack filed a concurring opinion, but with considerable hesitancy. He said: "Inasmuch, however, as there seems to be some basis, though slight, for the view that the failure of the railroads to attack the Texas rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be said to have been not compelled, but voluntary, in the sense of having been voluntarily assented to, instead of having been actively attacked, and inasmuch as the conclusions of my brethren are based in part at least upon this view, I concur, for this reason only, in upholding the Commission's order" (p. 391). Senator Sewell of New Jersey offered an amendment to the bill expressly conferring jurisdiction over the exact situation presented in the Shreveport cases. Whereupon it was rejected, due to the explanation of Senator Cullom, and others that the same proposition had already been weighed in committee, and rejected because believed to be unconstitutional. This is all a matter of history.

has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

Both of these grounds were declared untenable, and the court affirmed in full the orders of the Commission and the Commerce Court. As to the first ground, the result was to be anticipated, because virtually decided in the Minnesota Cases, as we have just seen. But not so as to the second ground. Indeed, three of the seven Interstate Commerce Commissioners had denied ⁹² that the

⁹² Six separate opinions were written, the majority opinion by Commissioner Lane, and concurring opinions by Commissioners Prouty (chairman) and Clark, while dissenting opinions were written by Commissioners Clements, Harlan and McChord.

Commissioner Lane's opinion is totally unconvincing from a legal standpoint. He thus concludes: "The interstate carrier which adopts a policy, even under state direction, that makes against the interstate movement of commerce must do so with its eyes open and fully conscious of its responsibilities to the federal law which guards commerce 'among the states' against discrimination.

"It is suggested that the exercise of such power to end discrimination between rates within a state and rates to interstate points must surely lead to a conflict in which the jurisdiction of one sovereignty or the other must give way. To this suggestion the one and sufficient answer is that when conditions arise, which in the fulfillment of its obligation and the due exercise of its granted power to regulate commerce among the states make such course necessary the national government must assume its constitutional right to lead." 23 I. C. C. Rep. 46.

Chairman Prouty, contrary to Commissioner Lane, expressly stated that prior decisions of the Commission should be overruled, when inconsistent with the view of the majority in this case. "When the federal authority does act, then the state cannot by its action interfere, for in case of actual conflict the state must yield." 23 I. C. C. Rep. 50.

Commissioner Clark said: "Whether or not the Congress has exercised its jurisdiction in these premises and whether or not it has delegated to us power to remove such discriminations and preferences are questions which apparently can never be settled until they have been passed upon by the court that is empowered to speak the last word. In this question as between two states possessing equal rights under the Constitution and equal rights to federal protection, discrimination that is unjust or preference that is undue, should, I think, be abated by federal authority, and so long as there is doubt it should be resolved in favor of that course which is harmonious with the fundamental and recognized purpose of the act to regulate commerce." 23 I. C. C. Rep. 51-52.

Commissioner Clements, mindful of the express limitations of the act, said: "The conclusion and order of the Commission in this case mark a new departure, in the interpretation of the statute as to the scope of its authority, from its steadfast attitude toward this fundamental question in all previous cases." 23 I. C. C. Rep. 53.

Commissioner Harlan: "I think that the Congress, in aid, or rather in protection, of interstate commerce may forbid discriminations by a railroad or other instrument of interstate traffic in favor of state traffic. This, however, it has not yet undertaken to do." 23 I. C. C. Rep. 54-55.

Commissioner McChord's dissenting opinion is eminently logical and sound, and

act gave them such power, desirable as it was. Justices Lurton and Pitney also dissented, but without expressing any reasons, which is to be regretted in such an important case.

The decision is meagre and unconvincing, as an example of statutory construction, and as such it must be primarily considered because the first consideration, that is, whether the order of the Commission was invalid on the ground that it exceeded the authority which Congress could lawfully confer, was disposed of by the Minnesota Cases, and the opinion of the court adds nothing to what had already been said. There is apparently the same disposition to confuse the action of Congress, through the Commission, with prior congressional action which operated directly upon the instrumentalities, or the very subject-matter of interstate commerce itself. Intrastate rates are never the instrumentalities or subject-matter of interstate commerce. Unless they represent that completely internal commerce of a state which since the time of *Gibbons v. Ogden* had been thought to be securely reserved to the states themselves, when can there ever be such commerce? Note the language of the court after analyzing the undisputed authority of the various cases dealing with the paramount power of Congress over safety appliances, hours of labor, employers' liability and the like:

in complete accord with prior decisions. He thus summarizes: "My position is that this Commission should confine itself within the four corners of the law of its creation, usurping neither the legislative function of the Congress nor the judicial power of the courts." 23 I. C. C. Rep. 63.

See in the Matter of Freight Rates, 11 I. C. C. Rep. 180; *Hope Cotton Oil Co. v. Texas & Pacific Ry. Co.*, 12 I. C. C. Rep. 266; *Reliance Textile & Dye Works v. Southern Ry. Co.*, 13 I. C. C. Rep. 48; *Williams Co. v. Vicksburg, S. & P. Ry. Co.*, 16 I. C. C. Rep. 482; *Andy's Ridge Coal Co. v. Southern Ry. Co.*, 18 I. C. C. Rep. 405; *Saunders v. Southern Express Company*, 18 I. C. C. Rep. 415; *Alpha Portland Cement Co. v. B. & O. R. R. Co.*, 22 I. C. C. Rep. 446. In fact, since the opinion in the Shreveport Case the Commission refused to remedy a discriminative situation growing out of state rates, but in so doing failed to distinguish the Shreveport Case. *Southwestern Shippers Traffic Assn. v. Atchison, T. & S. F. Ry. Co.*, 24 I. C. C. Rep. 570; but see *Loeb v. T. & P. Ry.*, 24 I. C. C. Rep. 304, and *Keogh v. Minn., St. P. & S. Ste. M. Ry. Co.*, 26 I. C. C. Rep. 73. See also *Cement Rates from Pa. to N. J.*, 26 I. C. C. Rep. 687; *Curry & White Co. v. D. & I. R. R.*, 30 I. C. C. Rep. 1; *Carroll Brough & Robinson v. Atchison, Topeka & Santa Fe Ry. Co.*, 31 I. C. C. Rep. 466; *Corporation Commission of Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 31 I. C. C. Rep. 532.

"While these decisions sustaining the federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." ⁹³

Well-sounding phrases these, but totally illogical. Since, as the Supreme Court has many times said in determining whether state legislation has unduly burdened interstate commerce, it must look through form to substance — must consider the real effect of the state legislation — why should it not do the same when the situation is reversed? For each power is equally plenary within its given sphere. Why did not the Supreme Court in both the Minnesota and Shreveport Cases face the situation squarely and admit that amendment of the Constitution, difficult as it is of attainment — and rightly so — is the only true remedy? "The power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress," ⁹⁴ reiterates the court. Yet in order to prove this the court relies upon a case, *Louisville & Nashville R. R. Co. v. Eubank*, which we have previously considered, wherein it was expressly held that if Congress had regulated the interstate rate there involved "there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the state, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists." ⁹⁵

To use the words of Justice Brewer, dissenting in the Eubank Case, "it is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the state respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words,

⁹³ 234 U. S. 353. See in this connection, *Louisville & Nashville R. R. Co. v. Higdon*, 234 U. S. 592.

⁹⁴ *Ibid.*, 354.

⁹⁵ 184 U. S. 41.

action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the state when like action by Congress in the exercise of its constitutional power does not.”⁹⁶ Does not the reasoning of Justice Hughes in the Shreveport Cases more nearly support the minority rather than the majority opinion in the Eubank Case?

Turning now to the second and really the vital question in the Shreveport Cases, namely, whether the Interstate Commerce Commission exceeded the authority given to it under the Interstate Commerce Act, the court, with a mere wave of its hand, sweeps aside the controlling proviso in Section 1 of the act, expressly excluding intrastate commerce from its jurisdiction. The whole history of the debates over the passage of the act, which the court cautiously avoids, would seem to show that it would never have been passed had it been believed to be capable of the construction which the Supreme Court has now placed upon it.⁹⁷ Clearly, this is judicial legislation. How could the court so soon erase what it had said in the Minnesota Cases, — that it is not its function “under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon”?⁹⁸

With equal ease the court overrules the case of *East Tennessee, etc. Ry. Co. v. Interstate Commerce Commission*⁹⁹ in order to accomplish its purpose, though of course without admitting that it does. Thirteen years before, it had decided in that case that the prohibition of Section 3 of the act was directed only against unjust discrimination and undue preference arising from the voluntary and wrongful act of the carriers, and did not relate to acts the result of conditions wholly beyond the control of the carriers, such as competition, and presumably therefore statute, court decree or order of an administrative, or semi-judicial body. “In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement,”¹⁰⁰ now says the court, and thus the case of *East Tennessee, etc. Ry. Co. v. Interstate Commerce Commission* is summarily disposed of by assuming as a premise the very question

⁹⁶ 184 U. S. 45.

⁹⁷ See Congressional Record, 49th Congress, 1st Session, vol. 17, pp. 3722, 4404.

⁹⁸ 230 U. S. 433.

⁹⁹ 181 U. S. 1 (1901).

¹⁰⁰ 234 U. S. 359. See also Intermountain Rate Cases, 234 U. S. 476.

to be proved.¹⁰¹ "We are not unmindful," says the court, concluding its opinion, "of the gravity of the question that is presented when state and federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control."¹⁰²

Thus Mr. Justice Hughes would carry us back again over those ninety years of decisions that we have just reviewed — back to *Gibbons v. Ogden* — and have us understand, from the lips of Chief Justice Marshall, that if Congress so wills it there shall be no internal commerce of a state. For such is necessarily to be the result of the Minnesota and Shreveport decisions. In the former the court said that "the situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling."¹⁰³ These appeals were all decided in conformity with the opinion in the Minnesota Cases.¹⁰⁴ As for the Shreveport decision, it is almost a truism to say that nearly every rate controversy to-day presents a question of discrimination as well as of unreasonableness *per se*. Months before the Shreveport decision was rendered, shippers in states adjoining Minnesota, believing that the court would decide as it has done, filed dozens of complaints based on discriminations which they alleged had resulted from the application of the scale of rates approved in the Minnesota Cases. Before the

¹⁰¹ The majority of the Commerce Court attempted to distinguish this case on the ground that it primarily involved the long and short haul clause of the original fourth section of the act, rather than the third section, and also on the ground that the administrative authority of the Commission had been materially increased by the amendments of 1906 and 1910, as the Supreme Court observed in *Procter & Gamble v. United States*, 225 U. S. 282, 297.

¹⁰² 234 U. S. 359-60.

¹⁰³ 230 U. S. 394.

¹⁰⁴ See *Missouri Rate Cases*, 230 U. S. 474; *Knott v. St. Louis S. W. Ry. Co.* and 14 other cases, 230 U. S. 509; *Knott v. St. Louis K. C. & Col. R. R. Co.*, 230 U. S. 512; *Oregon R. R. & Nav. Co. v. Campbell*, 230 U. S. 525; *Southern Pacific Co. v. Campbell*, 230 U. S. 537; *Allen v. St. Louis I. M. & So. Ry. Co.*, *Same v. St. Louis S. W. Ry. Co.*, 230 U. S. 553; *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298. See also *Chesapeake & Ohio Ry. Co. v. Conley*, 230 U. S. 513.

Shreveport decision the Interstate Commerce Commission had no further power after it had fixed the interstate rate at a reasonable maximum. Its hands were tied. Now it has an option of either changing the interstate rate or changing the local rate. Nor is there any persuasive force in the argument that in most instances the Interstate Commerce Commission will proceed with caution, feeling discretion to be the better part of valor, and will elect to exert its influence upon the interstate rate whenever possible.¹⁰⁵ The point is, the *power* to do otherwise is still there.

We have seen how Chief Justice Marshall first gave expression to the exclusive power of Congress in relation to matters purely national, and to the equally exclusive power of the states in relation to matters purely internal. We have seen how as a necessary corollary to these principles he first announced a third principle of concurrent powers, or, as we believe we have more appropriately described them, a dominant federal and a servient state power in matters which, although local in their nature, yet affect interstate commerce. We have seen our highest judiciary vacillating in its acceptance of this third and more novel principle until it was finally established in our constitutional law, as firmly as had been established the two earlier principles. But never, in any of the decisions, have we found support for this new fourth theory which the Minnesota and Shreveport Cases have evolved — the theory of a dominant federal and a servient state power in a field hitherto unconditionally reserved to the states — the field of local rate-making. Further, it is all the more strange to be told that the legislative branch of the government, Congress, through its administrative agent, the Interstate Commerce Commission, and not the judiciary shall determine what is a forbidden interference with interstate commerce. Such is the decision in the Shreveport Cases, for a ruling must first be obtained from the Commission before recourse may be had to the courts, and furthermore, under the provisions of the Interstate Commerce Act, it would seem that the railroads cannot, themselves, institute the necessary proceedings — an undue hardship unquestionably on

¹⁰⁵ As an example of this caution, see *Southwestern Shippers' Traffic Ass'n. v. Atchison, T. & S. F. Ry. Co.*, 24 I. C. C. Rep. 570; *Corporation Commission of Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 31 I. C. C. Rep. 532.

the railroads.¹⁰⁶ But why need resort first be had to the Commission? Its function is to determine questions of fact, — whether a given rate is reasonable *per se* or discriminatory in relation to other interstate rates. In an action for damages, therefore, the propriety of the established requirement that a ruling of the Commission be first had, cannot be disputed. But in the Shreveport Cases the question is primarily one of constitutional law, namely, whether what a state has done is a violation of the commerce clause. This is the same question involved in every case that we have considered. In the Eubank Case, upon which the court so much relies, no resort to the Commission was required. Wherein is the difference? The Supreme Court, *ab inconvenienti*, has read out of the Interstate Commerce Act the very passage that rendered it constitutional. After this, to what may not the alluring arguments of expediency lead us?

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BALTIMORE, MD.

¹⁰⁶ See Section 13 of the Interstate Commerce Act.

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THE APPOINTMENT OF PROFESSOR FRANKFURTER. — The facts of Professor Frankfurter's record without comment show the School's good fortune in his appointment and his special fitness for such courses as Public Service Companies, Criminal Law, and Penal Legislation and Administration. He graduated from the College of the City of New York in 1902, and from the Harvard Law School in 1906 after a brilliant record as a student which included membership on the editorial board of this REVIEW. He then was immediately appointed Assistant United States Attorney for the District of New York under the Honorable Henry L. Stimson (H.L.S., '90). This required him at once to take an active part in the series of great cases which marked the new activities of the Federal Government in regulating business in New York. These included, among many others, the rebate cases against the New York Central and other Trunk Line railways and against the American Sugar Refining Company as shipper, the proceedings against Edward H. Harriman, Charles W. Morse and F. A. Heinze and the well-known sugar weighing fraud cases against the officers of the Sugar Trust. In most of these cases Professor Frankfurter carried through the argument of the appeals alone, and his share in bringing about the distinguished success which directed so much attention to the District Attorney's office during this period has often been generously recognized by Mr. Stimson.

In July, 1911, Professor Frankfurter was appointed Law Officer of the Bureau of Insular Affairs in the War Department, and he filled that office until he accepted his present appointment. In this position he had the duties of Chief Legal Adviser of the Colonial Administration of the United States. All the important problems arising in the govern-

ment of the Philippine Islands and Porto Rico, and in the virtual protectorate over San Domingo from our administration of its customs, came before him for solution, and he argued before the Supreme Court the important cases arising from them. Having left the School to enter the public service he now returns from the public service to the School with experience of a kind most calculated to enrich his mind and expand his vision in the subjects which he is now called upon to teach.

THE LAW SCHOOL. — Professor Beale's new first-year course on Principles of Legal Liability marks an interesting attempt at economy of effort and a closer coördination of the first-year courses. The title of the course calls for a word of comment to guard against the misapprehension which might arise from a notion that "principles of legal liability" were the province of one course any more than another. Obviously it is with such "principles" that the courses on Contracts, or Property, or Torts not less than the new course are primarily concerned. Certain principles of liability, however, are so fundamental in their nature and so general in their application that a correct understanding of them is essential in more than one of the first-year courses. And when a large and difficult subject, such, for example, as Causation, is governed by principles which in their main outline do not differ essentially in criminal and in civil cases, there is an unfortunate duplication, to say nothing of possible confusion, in the effort to cover the subject in both Criminal Law and Torts. Furthermore such an effort may have a distinctly harmful effect in leading the student to think of the law as a group of unrelated matters in separate compartments instead of an organic whole. The same is true of certain defenses, such, for example, as the right of self defense, and other matters covered by Professor Beale's new case book. Owing to the nature of the course, which will contain much that has previously been taken up early in the year in the course on Criminal Law, it has been put in the first half year, and Criminal Law, which will be conducted by Professor Frankfurter, has been put in the second half year. Agency has been made a second-year course in order that students may have the advantage of undertaking its systematic study after a ground work of thorough preparation in courses more strictly primary in their nature. This change had made it possible to give three hours a week to the courses on Principles of Legal Liability and Criminal Law.

The course on Civil Procedure has been enlarged so as to cover more broadly the whole subject excepting Evidence. The matters to be taken up include venue, process, appearances, forms of action, parties, pleading, trials, motions for a new trial, motions based on the pleadings, judgments and appellate procedure. Approximately one-third of the time will be given to pleading.

In addition to the above, several other changes in the curriculum are to be noted. The course in New York Practice, given two years ago, will be repeated this year, under Mr. R. Campbell, A.B., LL.B., as will the course in Patents, under Mr. Odin Roberts, S.B., A.M., LL.B., who conducted it before. Mr. William G. Thompson, A.B., LL.B., of the Boston Bar, will again give his lectures in brief-making. A course on Penal Legislation and Administration will be given by Professor Frank-

furter. The resignation of Professor Wyman has necessitated a new arrangement of lectures. In the first-year courses, Professor Joseph Warren will assist Professor Williston in the course in Contracts. In the second-year courses, Professor Beale is to conduct the course in Property in place of Mr. Dutch, while Professor Frankfurter will conduct the course in Public Service Companies. In the third-year courses, Professor Scott will treat the subject of Suretyship and Mortgage, while Professor Pound will replace him in the course in Quasi-Contracts.

It is very pleasant to be able to congratulate Professor Austin Wakeman Scott, A.B., LL.B., and Professor Felix Frankfurter, A.B., LL.B., who have been appointed Professors of Law.

THE AMES COMPETITION. — The radical modifications in the structure of the Ames Competition which have been carried into effect in the present second-year class have already justified themselves in the light of increased interest and activity among the law clubs. In the last competition under the old rules, first and second prizes were won by the Kent and Bryce clubs, respectively. The Board of Student Advisers in charge of the competition this year is composed of Chauncey Belknap, Chairman, Montgomery B. Angell, J. Dwight Dana, Paul Y. Davis, John B. Dempsey, Chester A. McLain, T. Brooke Price and Clarence B. Randall.

To this body has fallen the task of reorganizing the competition along lines which were pointed out by last year's Board. It was felt that a plan which wholly eliminated from the competition more than half of the entering clubs by the end of the first round, failed to give any considerable number of men that training in the argument of cases which it was the chief aim of the competition to afford. As the contests progressed, the great majority of men were soon watching the scoreboard rather than playing the game.

A brief outline of the new rules will show how this objection has been overcome. The competition has been divided into two parts, a qualifying tournament in which each second-year club entering will meet six other clubs, and a third-year elimination tournament which preserves the principle of the old competition, but is restricted to a limited number of clubs which have established the best records during the second year. As will be seen, no club is put out of the qualifying tournament by failure to win a case. As the Ames prizes will be given to the winners of the third-year elimination tournament, they will not be awarded this year.

APPLICATION OF THE POLICE POWER IN THE INSURANCE RATE AND PIPE LINE CASES. — More than twenty years ago Mr. Justice Brewer protested against the doctrine of the *Granger Cases*¹ in the following words: "It seems to me that the country is rapidly travelling the road which leads to the point where all freedom of contract and conduct will be lost."² Two recent cases of far-reaching importance are founded upon an amplification of the principles and reasoning so vigorously de-

¹ *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391.

² See *Brass v. North Dakota*, 153 U. S. 391, 410.

nounced. In the *German Alliance Ins. Co. v. Lewis*, 34 Sup. Ct. 612, it was held, the Chief Justice and two of his associates dissenting, that a Kansas statute³ regulating the rates of fire insurance companies was not an unconstitutional taking of property without due process of law.⁴ The Pipe Line Case sustains the constitutionality of an amendment to the Interstate Commerce Act which placed all pipe lines transporting oil on the footing of common carriers, irrespective of whether they had ever professed to carry for the public.⁵ *United States v. Ohio Oil Co.*, 34 Sup. Ct. 956.

The instinct of modern lawyers is to regard rate regulation as an anomalous encroachment upon the freedom of the individual, confined by our Constitution to a small class of so-called "public callings" which has definitely ascertained limits. But formerly Parliament⁶ and the colonial assemblies⁷ regulated wages and prices in many other callings as a common function of government. The abeyance of the power during the first half century of our national existence was due to the dominance of *laissez faire* economics rather than to any constitutional obstacles to its exercise.⁸ Regulation persisted, however, in the case of carriers and innkeepers, who in a peculiar sense exacted tribute from the community.⁹ When the attempt was made to regulate other employments, the courts at first refused to exert this power of government through the common law, on the ground that they were being asked to extend an anomaly rather than to interpret a principle.¹⁰ But

³ SESSION LAWS OF 1909, c. 152, § 3. Although, narrowly interpreted, the statute confers this power only with respect to insurance corporations, it is significant that the court makes no attempt to support the statute as an exercise of the legislative power over corporations.

⁴ The case was followed and applied to surety and fidelity companies in *State v. Howard*, 147 N. W. 689 (Neb.).

⁵ In 26 HARV. L. REV. 631 it was submitted that the amendment was unconstitutional because it applied to "those who merely transport oil produced by their own wells, a proceeding which is hardly opposed to public policy." The Supreme Court excludes this possibility by straining the wording of the statute, and sustains its constitutionality as applied to concerns which transport oil from the western fields to eastern refineries, but by their monopoly of the means of transportation compel producers to sell at the wells.

⁶ In an article entitled "GOVERNMENTAL REGULATION OF PRICES," by Eugene A. Gilmore, 17 GREEN BAG, 627, many instances of general price regulation by Parliament are cited. See also BEALE AND WYMAN, RAILROAD RATE REGULATION, § 4.

⁷ The following are a few examples of colonial statutes regulating prices: MASS. COLONIAL LAWS (1630), p. 104, wages of labor; *ibid.* (1635), p. 120, and (1675), p. 236, forbidding excessive prices by shopkeepers and merchants; *ibid.* (1645), p. 80, price of beer; *ibid.* (1672), p. 8, price of boards; PLYMOUTH COLONIAL LAWS (1668), p. 156, price of boards; DANE'S AB., VII, p. 39 (1777), elaborate Mass. statute setting wages of labor, etc.; NEW YORK LAWS, 1778, c. 4, wages of farm laborers and mechanics and prices of many articles; GREENLEAF'S LAWS (New York), p. 275, requiring publishers to furnish books at reasonable prices.

⁸ There was no constitutional objection to such legislation by the states prior to the Fourteenth Amendment. With the Fifth Amendment in force Congress authorized the city of Washington "to regulate the sweeping of chimneys; . . . and to fix the rates of fees therefor." 3 STAT. 587, § 7.

⁹ For instances, see *Commonwealth v. Shortbridge*, 3 J. Marsh. (Ky.) 638; MASS. STAT. (1845) c. 191, § 2.

¹⁰ In the following cases the courts refused to compel gas companies acting under a permissive charter to serve all who applied at a reasonable rate: *Paterson Gas Co. v. Brady*, 3 Dutch (N. J. L.) 245 (1858); *McCune v. Norwich Gas Co.*, 30 Conn. 521 (1862); *Com. v. Lowell Gas Co.*, 12 Allen (Mass.) 75 (1866). Perhaps the thoroughly

where the public need was manifest and urgent, a fanciful resemblance to the innkeeper or the carrier was often worked out to sustain the constitutionality of regulation by the legislature. Examples of this are to be found in the familiar straining of facts to find a "dedication" to the public;¹¹ the argument that rates could not be regulated unless the business enjoyed eminent domain;¹² and other instances of artificial reasoning which have continued down to the dissenting opinions in the Pipe Line and Insurance Rate¹³ cases.

The significance of the two principal cases is that they discard the formal, threadbare analogy to carrier and innkeeper. The right to regulate prices is restored to its place as a branch of the police power of state and nation.¹⁴ In a previous case the Supreme Court had disapproved of any restriction of the police power to legislation promoting public health, morals and safety, and declared that it may be "employed in aid of what is held by the prevailing morality or strong and preponderant public opinion to be greatly and immediately necessary to the public welfare."¹⁵

The apparently wide latitude for price regulation which such an elusive criterion permits might seem to confirm the fears of Mr. Justice Brewer. But a study of the court's method in approaching the insurance rate problem¹⁶ is reassuring as a concrete demonstration of the advantages of such a test. The court, after overthrowing former tests, cited many statutes as evidencing a "strong and preponderant public opinion" that the situation demanded governmental regulation,¹⁷ and anachronistic insurer's liability which was imposed on innkeepers and carriers influenced the courts to think of all their other exacting duties as outgrown historical survivals.

¹¹ Conspicuous in *Munn v. Illinois*, 94 U. S. 113; and see comment in FREUND, POLICE POWER, § 372. In the Insurance Case there was no tangible property to be "dedicated" to the public aid, and in the Pipe Line Case there was an express exclusion of the public.

¹² Whereas the right of a business to eminent domain is itself dependent on the same considerations as the liability to price regulation. See *Harding v. Goodlett*, 3 Yerg. (Tenn.) 41; *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785.

¹³ The following passage in this opinion strikingly exhibits the constraints of the old analogies: "... as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills ... they all have direct relation to the business or facilities of transportation or distribution. ... They appear to be grouped around the common carrier as the typical public business."

¹⁴ *Wm. Draper Lewis*, in 21 HARV. L. REV. 609, distinguished the police power from the power to regulate prices, on the ground that the police power may be exercised without providing compensation for injury done, while price regulation must be reasonable. But the limits of the police power in a particular case are determined by the extent of the public welfare, which would not be served by requiring carriers, innkeepers or insurance companies to do business at less than a reasonable rate.

¹⁵ See *Noble State Bank v. Haskell*, 219 U. S. 104, 111. Cf. *Mutual Loan Co. v. Martell*, 222 U. S. 225, 237.

¹⁶ See 26 HARV. L. REV. 631 for a discussion of the Pipe Line Case after the decision in the lower court.

¹⁷ The following cases either sustain or assume the constitutionality of statutes regulating insurance: restricting the business to corporations—*People v. Loew*, 19 Misc. 248, 44 N. Y. Supp. 42; *Com. v. Vrooman*, 164 Pa. St. 306, 30 Atl. 217; *State v. Ackerman*, 51 Oh. St. 163, 37 N. E. 828; prescribing standard policies—*Orient Ins. Co. v. Daggs*, 172 U. S. 557; *N. Y. L. Ins. Co. v. Hardison*, 190 Mass. 190, 85 N. E. 410; *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769; prohibiting discrimination,—*People v. Hart L. Ins. Co.*, 252 Ill. 398, 96 N. E. 1049; *N. A. Ins. Co. v. Yates*, 214

the reasonableness of this dominant opinion is shown by an analysis of the business itself. Every prudent member of the community, for whom insurance in some form has become a necessity, is at the mercy of a few powerful corporations which frequently act in concert to extort unreasonable rates.¹⁸ Here is a situation which amply justifies regulation as far as it has gone, and, the court concludes, measuring the limits of the power by the extent of the public needs, "How can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not?"

No legislative fiat can force a business into the province where this power is operative, for the elements which warrant its exercise are beyond legislative control. Few employments are of such intrinsic public importance as to make regulation of their prices essential to the public welfare. But in the light of these decisions it must be clear that abstract principles of liberty and antiquated economic theories can no longer be invoked to justify the abuse of an economic advantage, however honestly it may have been acquired.

THE DISSOLUTION OF THE INTERNATIONAL HARVESTER COMPANY. — Two things are forbidden in the two famous opening sections of the Sherman Act, — combination in restraint of trade, and monopoly.¹ Prior to 1910 these vital words in the statute were confined to their strict linguistic value and no more, and there are extreme authorities from that period to the effect that any cutting down of competition whatever is *ipso facto* illegal if the result of combination.² But in 1910 the Supreme Court of the United States by its decisions and *dicta* in the Standard Oil and Tobacco cases wrought a profound change in what was generally understood to be the law, and declared illegal only those combinations which diminish competition and at the same time either in purpose or result jeopardize the business welfare of the general public or of private individuals.³ In both decisions the key-note is the defendant's unfair methods and abuse of power; in other words, the statute was interpreted in the light of the "rule of reason."

If combinations in restraint of trade as prohibited by the first section of the Act are to be tested by this new standard, it is difficult to find an

Ill. 272, 73 N. E. 423; Equitable L. Assurance Soc. v. Com., 113 Ky. 126, 67 S. W. 388; providing for increased recovery penalty in case of rate agreements — German All. Ins. Co. v. Hale, 219 U. S. 307; regulating rates — Citizens' Ins. Co. v. Clay, 197 Fed. 435.

A statute requiring insurance companies to charge reasonable rates has been in force in New Hampshire for fifteen years, but has apparently never been passed upon in the courts. NEW HAMPSHIRE LAWS, 1899, c. 85, § 1.

¹⁸ For two instances which have gotten into the reports, see Bell v. Louisville Board of Fire Underwriters, 146 Ky. 841, 143 S. W. 388; State of New Jersey v. Fireman's Ins. Co., 74 N. J. E. 372, 73 Atl. 80.

¹ Chap. 647, LAWS OF 1890; 26 U. S. STAT. AT LARGE, 209; 1 REV. ST. U. S. SUPP., 2d ed., 762.

² United States v. Joint-Traffic Association, 171 U. S. 505; United States v. Trans-Missouri Freight Association, 166 U. S. 290.

³ Standard Oil Co. v. United States, 221 U. S. 1. See especially the dissenting opinion of Harlan, J., which is based on the argument that the Supreme Court is reversing itself. United States v. American Tobacco Co., 221 U. S. 106. See article by Robert L. Raymond, 25 HARV. L. REV. 31.

adequate basis for dissolving the International Harvester Company, as was done recently by a Federal District Court. *United States v. International Harvester Co.*, 214 Fed. 987 (Dist. Ct. Minn.).⁴ The prosecution failed to prove any undue enhancement of prices, limiting of production, cutting of wages or the prices on raw materials, or any substantial use of unfair methods toward competitors, although the combination of six formerly independent manufacturers of harvesting machinery had been completed for over ten years.⁵ And yet the corporation was dissolved. The majority seem to rest their opinion on the single fact that the corporation controls over 80 per cent of the total product. With due respect, it is submitted that this is a return to the earlier cases, for mere size cannot possibly constitute illegal restraint of trade under the present interpretation until it has been shown that unfair conduct characterized or injurious results flowed from the combination.

Nor does it satisfactorily appear that the Harvester Company has violated the second section of the statute, that "every person who shall monopolize, etc. . . . shall be guilty." Even if the word "monopoly" be taken strictly, the case against this corporation falls short, for the record shows that its percentage of the total product has materially decreased during the ten-year period, that a new competitor capitalized at \$20,000,000 has successfully entered the field, and that other competitors have prospered and grown. But if it is premised, nevertheless, that the percentage of output is so overwhelming as to be conclusive on the question of power to control the industry, the issue is squarely raised of whether within the purview of the Act the essence of monopoly is to be regarded as power or the abuse of power. The conclusion seems irresistible that the rule of reason softens the provisions of the second section of the Act just as it does the first.⁶ The language of Mr. Justice White in the Tobacco case indicates that the limitation of reasonableness is a rule of construction for the entire statute,⁷ while in the Standard Oil case he describes the Act as purely declaratory, and says that at common law "monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public."⁸ He says in the Tobacco case that the majority rest their opinion not on the power and dominion of the corporation, but on its unlawful practices.⁹ But the strongest support for this view is to be found in a case decided since 1910, where the Supreme Court declares that the unification of all the terminal facilities in a city is not under all circumstances illegal, but only becomes so when it appears that the control was wrongfully obtained or injuriously exercised.¹⁰ Under this interpretation of the

⁴ The court was composed of three circuit judges, Sanborn, Smith, and Hook. Judge Sanborn dissented vigorously from the majority opinions. For a statement of the case see RECENT CASES, p. 114.

⁵ The leading majority opinion makes no charge whatever of reprehensible conduct, the concurring judge expressly exonerates the defendants from such a charge, while the dissenting judge quotes at length from the record to show how exemplary have been the operations of the corporation.

⁶ See 9 COL. L. REV. 104.

⁸ *Ibid.*, pp. 1, 54.

⁷ 221 U. S. 106, 180.

⁹ *Ibid.*, pp. 106, 182.

¹⁰ *United States v. St. Louis Terminal*, 224 U. S. 383, 394, 395. On p. 395 occurs a phrase which appears to be contradictory. The court says, "Whether it is an unreasonable restraint will depend upon the intent to be inferred from the extent of the

Sherman Act the dissolution of the International Harvester Company, or of any other combination that possessed the power to control an industry, could only be justified on proof that the power so held had been, or was about to be, abused to the injury of the public or individuals.

The decision of the Supreme Court will be awaited with widespread interest. To affirm the lower court and hold that mere size and the potential control of an industry constitute a sufficient basis for dissolution would devitalize completely the rule of reason. The case is consequently one of tremendous importance to American industry.

LEGISLATIVE MINIMUM WAGE FOR WOMEN AND MINORS. — The Fourteenth Amendment to the Constitution does not deprive the states of the right, in the exercise of the police powers of government, to take measures for protecting the safety, health, morals and welfare of their citizens.¹ While it is now recognized that a state may upon this ground regulate the conditions of labor in modern industry in the interest of social betterment, the constitutional limitations upon legislation of this character are not in general well defined. As regards limiting the hours of work, however, the prevailing doctrine has come to be that reasonable restrictions may be placed upon the length of daily employment of all women and children workers² and of men engaged in particularly dangerous and unhealthful occupations.³ Decisions to this effect are plainly sound in view of the manifest necessity of protecting the health of such classes of workers from the peculiar risks to which they are subjected. On the other hand, the validity of minimum wage statutes had not been determined until the Supreme Court of Oregon recently held constitutional a statute which authorizes a commission to fix under criminal penalties a legal minimum wage for women and children employed in any industry. *Stettler v. O'Hara*, 139 Pac. 743.⁴

control secured"; but the opinion taken as a whole isolates this single clause and justifies regarding the case as an authority for the proposition that it is not power but the abuse of it which constitutes a violation of the Sherman Act.

¹ Harlan, J., in *Patterson v. Kentucky*, 97 U. S. 504; and see article by Francis J. Swayze in 26 HARV. L. REV. 1. For an example of the broad application of the police power in another connection, see this issue of the REVIEW, p. 84.

² *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52; *Muller v. Oregon*, 208 U. S. 412; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421; *Commonwealth v. Hamilton Co.*, 120 Mass. 383; *Ritchie Co. v. Wayman*, 244 Ill. 509; *People v. Elderding*, 254 Ill. 579; *Commonwealth v. Riley*, 210 Mass. 387; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324. *Ritchie v. People*, 155 Ill. 98, *contra*, has been distinguished by the later Illinois cases.

³ *Holden v. Hardy*, 169 U. S. 366; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1. *Re Morgan*, 26 Colo. 415, 58 Pac. 1071, *contra*. In the following case the nature of the employment was held not to justify the regulation: *Lochner v. New York*, 198 U. S. 45; and see *Ex parte Westerfield*, 55 Cal. 550. Without resorting to the exercise of the police power, the state may as a condition of letting its contracts enforce more stringent regulations as to hours of labor upon work done for itself or its municipalities. *Atkin v. Kansas*, 191 U. S. 207; *Byars v. State*, 2 Okla. Cr. 481. *People v. Coler*, 166 N. Y. 1, *contra*. On the same ground a minimum wage may be enforced in public employment. *Malette v. Spokane*, 137 Pac. 496 (Ore.). But see *Street v. Varney Co.*, 160 Ind. 338, 66 N. E. 895.

⁴ A statement of the facts of this case appears in RECENT CASES, p. 105.

Statutes regulating wages seem to differ somewhat radically from those which limit the hours of labor. The latter may constitutionally restrict the bargaining of employer and employee only to an extent determined by the harmful effects of the occupation upon the class of workers in question; whereas the minimum wage acts fix the pay a worker must receive by the sum needed to meet adequately the local cost of living, a sum which may vary in different localities.⁵ Regulation of the hours of labor may be considered as preventing the employer from using his superior economic position to injure the health of his employees. Fixing the minimum wage seems rather like compelling him affirmatively to assist them in order to correct social evils which, in a sense, he has not caused.⁶ The employer may compare himself to the keeper of a restaurant, whom the state may legitimately prohibit from selling harmful food, but who cannot be ordered to lower his prices in order to solve the social problem of under-feeding.

Such arguments, it is submitted, exaggerate the difference between the two methods of regulation by minimizing the claim which the workers have upon the industry that employs them. The manufacturer who underpays is in fact affirmatively injuring his employees by utilizing the economic pressure for employment as a club. The wages paid an employee are as much the effect of the industry upon him as the hours he is made to work, and settle in large measure his whole condition in life. Moreover, if the state is to reduce the amount of labor the worker may daily offer for sale, it must for his protection prevent the employer from reducing correspondingly the price paid for it.⁷ It would seem therefore that the police power must extend so far. That it does is indicated by the analogous case of the usury laws.⁸ Fixing the return a lender may exact for the use of his money seems not essentially different from fixing the return an employer must give for the labor he receives.

The minimum wage, then, seems fundamentally similar in principle to other accepted applications of the police power. To be constitutional, it must also appear reasonably adapted to improve the welfare of the

⁵ For this reason it would appear that if the minimum wage is constitutional in any case for men workers, there could be no ground for limiting it to dangerous occupations.

⁶ Cf. COOLEY, CONST. LIM., 7 ed., p. 870; TIEDEMAN, LIMITATIONS OF THE POLICE POWER, § 178; FREUND, POLICE POWER, § 318; see also a pamphlet by Rome G. Brown entitled "THE MINIMUM WAGE."

⁷ Although this argument applies only to a minimum wage for such workers as are now subject to legal regulation of the hours of labor, — namely, those employed in hazardous occupations and women and children, — it is serviceable in the Oregon case, since there is an Oregon hours-of-labor statute applying to the same classes of employees as the act here in question.

⁸ See an article by Learned Hand in 21 HARV. L. REV. 495, 505, n. 2. As is there pointed out, the usury statutes, with a continuous history since the days of Tudor paternalistic legislation, are one of the few forms of governmental regulation of business which came unscathed through the period of the *laissez faire* economic doctrine. Although anomalous in this respect, they are none the less legitimate instances of the sort of thing that represented "due process of law" at an early period. See in this connection articles by E. S. Corbin in 24 HARV. L. REV. 366, 460, and Prof. Roscoe Pound in 18 YALE L. J. 454. Wages were also regulated by statute as long ago as 5 Eliz., but such laws had become a dead letter before the adoption of our Constitution. The recent statutes are probably the first attempt to fix wages by law since colonial days.

workers in question.⁹ The imposing array of evidence adduced by sociologists seems clearly to indicate the need of a remedy for the starvation wages paid the workers in many of the sweated industries.¹⁰ The health of the employees is enfeebled by the conditions under which they must live; their value as citizens is lessened, and the women are to a considerable extent unfitted for motherhood and driven into immorality. Whether the state control of wages is calculated to improve these conditions is for the courts to say.¹¹ The question is obviously one of fact. The court, however, should not be controlled by the economic theories of the judges who compose it, but should accept any reasonable attempt of the legislature to solve the industrial problems which confront modern lawgivers, so long, at least, as it does not "infringe fundamental principles as they have been understood by the traditions of our people and our law."¹²

PARENTAL LIABILITY FOR A SON'S USE OF THE FAMILY AUTOMOBILE.

— Generally the father is better able than the son to pay for harm caused by the latter. It is, however, well settled that at common law the parent is not liable for the torts of even his minor child.¹ But the injured party may benefit by discovering a master and servant relationship between the two.² Even this relationship avails nothing if the servant is acting for his own purposes "on a frolic of his own."³ Thus when a hired chauffeur goes for a "joy-ride" in his employer's car, the employer is not liable for any damage the chauffeur may cause.⁴ This is so when he takes the car for his own delectation with or without permission.⁵ Moreover, when a son takes his father's horse for his own affairs no liability attaches to the father.⁶ Between a hired chauffeur and a pampered son there is a considerable difference in fact. The difference is still more marked between an automobile and a horse. Does the law make a distinction?

⁹ See *Mugler v. Kansas*, 123 U. S. 623, 661; *Minnesota v. Barber*, 136 U. S. 313, 320; *Lawton v. Steele*, 152 U. S. 133, 137.

¹⁰ See literature referred to in the principal case; also, *ANNALS AM. ACAD. POL. AND SOCIAL SCIENCE*, July, 1913; *BROWN, UNDERLYING PRINCIPLES OF MODERN LEGISLATION*, p. 316.

¹¹ In this connection the rapid spread of the legislative minimum wage in this country is significant. The following states have adopted it in some form: California, *STATUTES* 1913, cap. 324; Colorado, *LAWS* 1913, cap. 110; Massachusetts, *ACTS* 1912, cap. 706, *ACTS* 1913, caps. 330, 673; Minnesota, *LAWS* 1913, cap. 547; Nebraska, *LAWS* 1913, cap. 211; Ohio, *Constitutional Amendment*, 1913; Oregon, *ACTS* 1913, cap. 62; Utah, *LAWS* 1913, cap. 63; Washington, *LAWS* 1913, cap. 174; Wisconsin, *STATUTES* 1913, cap. 1729, *LAWS* 1913, cap. 712.

¹² *Holmes, J., dis.*, in *Lochner v. New York*, *supra*, at p. 76.

¹ *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343; *Moon v. Towers*, 8 C. B. (N. S.) 611.

² *Lashbrook v. Patten*, 1 Duv. (Ky.) 316; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761.

³ *Parke, B.*, in *Joel v. Morison*, 6 C. & P. 501.

⁴ *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433; *Hartnett v. Gryzmish*, 105 N. E. 988 (Mass.). But see *Whimster v. Holmes*, 164 S. W. 236 (Mo.).

⁵ *Davies v. Anglo-American Auto. Tire Co.*, 145 N. Y. Supp. 341; *Cunningham v. Castle*, 127 N. Y. App. Div. 580.

⁶ *Maddox v. Brown*, 71 Me. 432.

That the law does see a difference in the case of the son and the motor car combined, appears in a recent South Carolina case, where the son habitually drove the family machine with his father's consent. The father was held, although at the time of the accident the son was using the car for his own pleasure. *Davis v. Littlefield*, 81 S. E. 487.⁷ The court argued that in giving himself health and pleasure the son was acting as his father's servant in the scope of his employment.⁸ A few other cases have taken this view.⁹ Where the son takes the family out, he might very properly be considered the servant of his father.¹⁰ But when he frolics off with the automobile on a party of his own, this agency relationship is more difficult to conceive. Suppose, however, a frail son, or one injuring his health by too zealous an application to work. His affectionate, though wealthy, father is much concerned. He buys a machine, and tells his son to use it in the pursuit of health and pleasure. While thus pursuing, the son pursues and runs down the plaintiff instead. If these facts could be proved, a not unwilling jury might find that the son's frolic was not "a frolic of his own," but really of his father's. The question is whether any father does this. It is submitted that most of them do not. Such an idea of vicarious enjoyment is far too fanciful — as much so in the case of an automobile as it would be, for instance, if the father bought a pair of roller skates for the son, or told him to use the family roller skates. The argument might as well be extended to a chauffeur who is occasionally allowed the use of the car so that he will be more satisfied with his work.

Another line of reasoning has been applied recently in a Missouri case, where the father was held because an automobile is a dangerous instrumentality. *Hays v. Hogan*, 165 S. W. 1125.¹¹ The difficulty with this is that it is rather well settled that an automobile is not a dangerous instrumentality.¹² As to boys the courts are silent.¹³ An automobile is dangerous to third persons only when operated by a dangerous driver.

⁷ The son was a minor, but this had no effect on the decision. For a statement of this case, and the two other recent cases cited in this note, see this issue of the REVIEW at page 100.

⁸ The father had testified that he bought the machine for the "health and pleasure" of his family. Therefore, the court said, he made the health and pleasure of the family his business, and the son in enjoying himself was performing this business.

⁹ See *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020. In *Kayser v. Van Nest*, 146 N. W. 1091 (Minn.) two sisters were out driving with friends. From the language of the court, the decision would have been the same had only one been present.

¹⁰ *Smith v. Jordan*, *supra*; *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742; *Missell v. Haynes*, 91 Atl. 322 (N. J.); *Ploetz v. Holt*, 144 N. W. 745 (Minn.).

¹¹ The Springfield Court of Appeals on an appeal from a motion granting the defendant a new trial gave judgment for the plaintiff. A motion for rehearing was overruled, but a motion to transfer to the Supreme Court was sustained on the ground that the case conflicted with previous decisions.

¹² *Daily v. Maxwell*, *supra*; *Cunningham v. Castle*, *supra*; *McNeal v. McKain*, *supra*; *Jones v. Hoge*, *supra*; *Parker v. Wilson*, 60 So. 150 (Ala.); *Danforth v. Fisher*, 75 N. H. 111; *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336; *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618. But see *Ingraham v. Stockamore*, 63 N. Y. Misc. 114; and *dicta* in *Doran v. Thomsen*, 76 N. J. L. 754.

¹³ In *Allen v. Bland*, 168 S. W. 35 (Texas) the son, age eleven, owned the car. There was evidence to show that his head barely came above the steering wheel. The court said the automobile was not a dangerous agency. One might draw his own conclusions as to the boy.

So if the father entrusted the car to a very young or incompetent son, he might well be held on account of his own negligence — much as if he had given such a youth a gun.¹⁴ But on the assumption that the son was *compos mentis* (except as afterwards shown by the “joy-ride”) the father should not be liable. A recent New York case has so held, following previous authority in that state.¹⁵ *Heissenbuttel v. Meagher*, 162 N. Y. App. Div. 752. This is in accord with the majority of the decided cases.¹⁶

But it may be urged, on the other hand, that, as automobiles have latent possibilities of causing great damage, and yet are treated almost disrespectfully by the youngest children, as a matter of justice the owner should be absolutely liable for injuries inflicted. Such a rule might have a salutary effect, but its creation is within the province of the legislatures, not of the courts, and should not be arrived at by distorting the principles of agency and torts to fit the case.¹⁷ Let not the ancient maxim be transformed to read, *Qui facit per auto facit per se*.¹⁸

STATE POWER TO TAX THE PROCEEDS OF INTERSTATE COMMERCE. — By what method and to what extent a state may tax the receipts from interstate commerce without its constituting an interference with federal regulation is a question which has been frequently presented to the United States Supreme Court. This judicial consideration, however, has formerly served to obscure rather than to facilitate the solution of the problem, as upon several occasions the court has altered its position, not infrequently with its members nearly evenly divided; while each of its views, for a time at least, has found followers. At first a tax was permitted “upon the gross receipts” of transportation companies even in addition to other property assessments.¹ But the court refused to follow this case,² and its result was soon repudiated.³ A levy

¹⁴ *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013; *Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933.

¹⁵ *Maier v. Benedict*, 123 N. Y. App. Div. 579. See also *Roberts v. Schanz*, 144 N. Y. Supp. 824.

¹⁶ *Maier v. Benedict*, *supra*; *Parker v. Wilson*, *supra*; *Reynolds v. Buck*, 127 Ia. 601, 103 N. W. 946; *Doran v. Thomsen*, *supra*; *Linville v. Nissen*, 77 S. E. 1096 (N. C.); 25 HARV. L. REV. 734. *Tanzer v. Read*, 160 N. Y. App. Div. 584, was a case where the wife of the owner was driving. The court said she was in no sense acting as an agent.

¹⁷ See remarks of Clarke, J., in *Cunningham v. Castle*, *supra*.

¹⁸ Although to a Greek scholar such a maxim may appear sound, it is philologically incorrect, and should not be translated into English.

¹ *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284, Justices Miller, Field, and Hunt dissenting. The court, reasoning on the analogy of *Brown v. Maryland*, 12 Wheat. (U. S.) 419, declared this to be no less valid than a tax on goods imported into the state and mingled with the general mass of property. The case was followed in *Western Union Telegraph Co. v. Mayer*, 28 Oh. St. 521, and *Western Union Telegraph Co. v. Commonwealth*, 110 Pa. 405, 20 Atl. 720.

² *Fargo v. Michigan*, 121 U. S. 230.

³ *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326. The answer to the suggested analogy of *Brown v. Maryland*, *supra*, is pointed out by Bradley, J., 122 U. S. 326, 341: imported goods “are not followed and singled out for taxation as imported goods, and by reason of their being imported.” The same principle is to be found in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411.

upon the actual receipts themselves was classified the same as any direct regulation of interstate transportation.⁴ This apparently settled the question, but later a statute was sustained which imposed upon railroads companies in lieu of other property taxes, except local assessments on land and fixtures, "an annual franchise tax" based on gross receipts and the ratio which the amount of mileage within the state bore to the road's total mileage.⁵ This decision has been subjected to much adverse criticism,⁶ and cannot be sustained on the ground upon which it was put: as a grant of a license to do business; for a state cannot charge for the privilege of engaging in interstate commerce.⁷ It was saved by a later case, however, as being merely a device for ascertaining the actual value of railroad property within the state.⁸ Thus the prevailing view is that a tax on the receipts *quâ* receipts is unconstitutional,⁹ but a tax on the intrastate property calculated by reference to the receipts is valid. Albeit the distinction is somewhat narrow, the temptation to interfere with interstate commerce is not present in the same degree as it would be if direct assessments upon gross receipts were permitted.¹⁰

But if a tax is to be upheld as a property tax, it is not legislative designation which makes it so. Its name is only of consequence as being a clue to legislative intent. By taking other facts into consideration the court must find that it actually is a tax upon property.¹¹ Thus, for example, if the tax levied be unduly great with reference to the real value of the company's property within the state, it cannot be sustained.¹² It is likewise important to observe what other taxes are imposed. If the assessment on gross receipts be in lieu of direct taxes on property, that fact is almost decisive in favor of its constitutionality.¹³

⁴ Case of State Freight Tax, 15 Wall. (U. S.) 232. In *Philadelphia and Southern Steamship Co. v. Pennsylvania*, *supra*, 122 U. S. 326, 340, Bradley, J., says, "A tax upon fares and freights received for transportation is virtually a tax upon the transportation itself."

⁵ *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217. Justices Bradley, Harlan, Lamar and Brown dissenting.

⁶ See COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, § 73 a; WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, § 338; article by Professor Beale, 17 HARV. L. REV. 248, 262.

⁷ *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Leloup v. Mobile*, 127 U. S. 640; *McCall v. California*, 136 U. S. 104; *Crutcher v. Kentucky*, 141 U. S. 47; BEALE, FOREIGN CORPORATIONS, § 751.

⁸ *Galveston, H. & S. Ry. Co. v. Texas*, 210 U. S. 217, Justices Harlan, Fuller, White, and McKenna dissenting. This case has been followed by *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298; *United States Express Co. v. Minnesota*, 223 U. S. 335.

⁹ It should be observed that nothing turns on phraseology in this connection. In *Galveston, H. & S. Ry. Co. v. Texas*, *supra*, 210 U. S. 217, 227, Holmes, J., says, "The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let interstate traffic and the receipts from it alone."

¹⁰ In *Galveston, H. & S. Ry. Co. v. Texas*, *supra*, 210 U. S. 217, 227, Holmes, J., says, "When a legislature is trying simply to value property, it is less likely to attempt or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce."

¹¹ See Holmes, J., in *Galveston, H. & S. Ry. Co. v. Texas*, *supra*, 210 U. S. 217, 227.

¹² *Fargo v. Hart*, 193 U. S. 490.

¹³ See *United States Express Co. v. Minnesota*, *supra*.

But if, on the other hand, there be a gross revenue tax which is to be in addition to taxes levied and collected upon an *ad valorem* basis upon property and assets, this would seem an almost conclusive factor the other way.¹⁴

The true distinctions in the matter appear to have been overlooked by a holding not long ago in a lower Texas court in favor of the validity of a statute imposing upon terminal companies an "occupation tax" equal to one per cent of their gross receipts. *State v. Houston Belt & Terminal Ry. Co.*, 166 S. W. 83 (Tex. Civ. App.).¹⁵ The court, quoting from the repudiated reasoning of one of the earlier United States Supreme Court cases,¹⁶ relies chiefly upon the word "occupation" to make the enactment constitutional. But this would seem to lead to the opposite conclusion; for if the statute really provides for what it declares it does, namely, an assessment upon the privilege of conducting the occupation of a terminal company, it would be clearly invalid.¹⁷ Nevertheless, if in spite of its name the statute provides for what is in reality a property tax, the statutory title may be disregarded and the substance of the statute investigated.¹⁷ By its terms nearly all the old taxes are to continue, except one upon intangible¹⁸ assets.¹⁹ It does not appear what the intangible assets of the contesting terminal company are worth, but if the amount of the tax when compared with the value of those assets is not excessive,¹² then the assessment here may constitutionally be defended as a property tax.²⁰ Nor can there be any question as to apportionment of the valuation of the intangible assets according to the Texas mileage,²¹ as the mileage of this terminal company is all within the state.

Accordingly, should the occasion arise to review this decision, the United States Supreme Court, although it conceivably might uphold the tax, would seemingly have difficulty in reconciling the reasoning of the court with the prevailing principles governing the utilization of the proceeds of interstate commerce as a basis for taxation.

DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE OFFICIALS. — Recent decisions afford frequent illustration of changes in the law to meet altered social, economic, and political conditions. The United States Supreme Court has lately held that a married woman may acquire a domicile apart from her husband for the purpose of

¹⁴ See *Oklahoma v. Wells, Fargo & Co.*, *supra*.

¹⁵ This case is more completely stated in this issue of the REVIEW, p. 115.

¹⁶ *Maine v. Grand Trunk Ry. Co.*, *supra*.

¹⁷ *Postal Telegraph Co. v. Adams*, 155 U. S. 688.

¹⁸ Intangible assets comprise the property value of the franchise, commercial securities, choses in action, good-will, the value of the business as a going concern, etc. See article by Professor Beale, 17 HARV. L. REV. 248.

¹⁹ The tax upon intangible assets was imposed by ACT 29TH LEG., c. 146. A former "occupation" tax, imposed by ACT 29TH LEG., c. 148, was repealed by the statutory enactment in question.

²⁰ In *Maine v. Grand Trunk Ry. Co.*, *supra*, the intangible assets were all that were left untaxed, and yet the statute was upheld.

²¹ This was the method employed in *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, and in *Maine v. Grand Trunk Ry. Co.*, *supra*.

bringing suit other than for divorce.¹ Decisions upholding the constitutionality of statutes limiting the hours of labor of men² and women³ are now numerous; even a minimum wage law has been sustained.⁴ The necessities of modern government require the application of technical knowledge to complex situations. Herein is the explanation of the tendency toward government by commission.⁵ Thus, also, statutes which would have been condemned a generation ago as unlawfully delegating legislative power to administrative officials are now sustained. A case strikingly illustrative was recently determined in Porto Rico. *People of Porto Rico v. Neagle*, Sup. Ct. P. R., Aug. 1, 1914⁶ (not yet reported). A statute levying a license tax on the doing of certain businesses provided that the Insular Treasurer should classify each taxable business into one of five classes according to the importance of the business, as measured by the volume of business done and in comparison with other similar businesses. The amount of tax for each class was specified. The statute was upheld against an attack that no standard of classification was defined and therefore that legislative power was granted to the Treasurer to fix the rate of taxation.⁷

To the principle that legislative power cannot be delegated, one exception has always been admitted, that power over local affairs may be delegated to municipalities.⁸ Another exception is that the enforcement of legislative enactments may be made contingent.⁹ Application of the latter principle in *Field v. Clark*,¹⁰ where the occurrence of the contingency was within the discretion of the executive, was the beginning of a line of cases which have gone much further, and evolved the rule that the legislative enactment is valid if it lays down a general rule or fixes a "primary standard" for the guidance of administrative officers, though delegating power to administrative officers to exercise discretion "to fill in the details." These cases have upheld statutes which have authorized executive officials to fix the standard of inferiority of tea, where the importation of inferior tea was prohibited;¹¹ to remove

¹ *Williamson v. Osenton*, 232 U. S. 619.

² *Missouri K. & T. Ry. Co. v. United States*, 231 U. S. 112.

³ *Muller v. Oregon*, 208 U. S. 412; *Riley v. Mass.*, 232 U. S. 671.

⁴ *Stettler v. O'Hara*, 139 Pac. 743 (Ore.). For a discussion of this case, see this issue of the REVIEW, p. 89.

⁵ See 25 HARV. L. REV. 704.

⁶ A statement of this case appears in RECENT CASES, p. 105.

⁷ The Organic Act of Porto Rico, Act of Congress of April 12, 1900 (31 Stat. L. 77), commonly known as the Foraker Act, delegated legislative power to the Legislative Assembly of Porto Rico. To fix the rate of taxation is a legislative function. *Central R. Co. v. State Board*, 49 N. J. L. 1; *State v. Mayor, etc. of Des Moines*, 103 Ia. 76, 72 N. W. 639; *State v. Hudson Co. Com.*, 37 N. J. L. 12.

⁸ COOLEY, CONST. LIMITATIONS, 6 ed., pp. 137, 248, 724; DILLON, MUNICIPAL CORPORATIONS, 6 ed., §§ 244, 889, 1383; MCQUILLAN, MUNICIPAL CORPORATIONS, §§ 382, 384, 386, 728, 998, 2360, 2363.

⁹ WILLOUGHBY, CONSTITUTION, § 775 *et seq.*

¹⁰ 143 U. S. 649. In this case the majority of the court upheld the reciprocity act, which provided that whenever and so often as the President should deem the tariff of a foreign country reciprocally unequal and unreasonable, he should suspend the congressional act for such time as he should deem just. The dissenting opinion of Justices Lamar and Fuller is a strong presentation of the orthodox rule against delegating legislative power.

¹¹ *Buttfield v. Stranahan*, 192 U. S. 470.

obstructions to navigation deemed unreasonable;¹² to fix the standard height of drawbars;¹³ to establish rules necessary for the preservation of forests;¹⁴ and to establish a uniform system of railroad accounts.¹⁵ The old rule requiring the legislature to make the law confined the lawful exercise of discretion by administrative officials within narrow bounds.¹⁶ Thus has come a distinct departure, and wide discretion is now permitted to executives, even to tell what the law is. Although in the Supreme Court cases it was demonstrated that the statute had provided some "primary standard" or "general rule," often it was only that of reasonableness; the significant reasoning appeared in the statement, that to deny the validity of such statutes "would stop the wheels of government."¹⁷

The Porto Rican case is plainly right in following the controlling authorities,¹⁸ likewise in denominating the Treasurer's duties administrative. But it is to be noted that the conception of what constitutes legislative powers so that their delegation is unconstitutional has changed, and that the exercise of certain discretionary power by administrative officers formerly considered legislative is now held unobjectionable.

THE FIVE PER CENT RATE CASE.¹—The decision rendered this summer by the Interstate Commerce Commission in the so-called Five Per Cent Case is illustrative of the difficulties involved in regulating interstate commerce rates. *The Five Per Cent Case*, 31 I. C. C. 551.² The railroads serving official classification territory, which includes all that part of the United States from the Atlantic seaboard to the Mississippi River north of the Ohio River, joined in this proceeding to secure the Commission's approval of a so-called five per cent increase in their freight rates. The increases proposed ranged from five per cent to as high as fifty per cent on certain short-haul traffic, with a provision for a minimum increase of five cents per ton in all rates named in cents per ton when less than \$1.00.

The Commission was unanimous in its decision, "that the net operat-

¹² *Union Bridge Co. v. United States*, 204 U. S. 364.

¹³ *St. Louis Ry. Co. v. Taylor*, 210 U. S. 281.

¹⁴ *United States v. Grimaud*, 220 U. S. 506.

¹⁵ *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194; *Kans. City So. Ry. Co. v. United States*, 231 U. S. 423.

¹⁶ See cases *supra*, footnotes 7 and 8.

¹⁷ *Field v. Clark*, 143 U. S. 649, 694; *Buttfield v. Stranahan*, 192 U. S. 470, 496; *Union Bridge Co. v. United States*, 204 U. S. 364, 385, 386, 387.

¹⁸ The cases upholding the power of commissions to regulate rates, where the standard is that of reasonableness, furnish strong analogies. *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866 (1888); *People v. Willcox*, 194 N. Y. 383, 87 N. E. 517; *Oregon R. & N. Co. v. Campbell*, 173 Fed. 957; *State v. R. Co.*, 52 Wash. 33, 100 Pac. 184; *So. I. Ry. Co. v. R. Co.*, 87 N. E. 966 (Ind.); *Louisville & N. R. Co. v. I. C. C.*, 184 Fed. 118. For a discussion of the recent Intermountain Rate Cases, where the Supreme Court did not object to a considerable delegation of such power, see RECENT CASES, p. 110.

¹ The facts involved in this important decision are so voluminous and complicated that an extended discussion of the principles involved cannot be attempted within the confines of this note, but it is thought that a brief résumé of the decision itself may be of interest to the profession.

² A rehearing of this case has already been ordered by the Commission on a petition by the railroads.

ing income of the railroads in official classification territory, taken as a whole, is smaller than is demanded in the interest both of the general public and the railroads." This general conclusion was based upon an examination of the results of railroad operation in this territory during the fourteen years from 1900 to 1913 inclusive. During this period the operating expenses of these roads increased 133 per cent, while gross operating revenues increased only 110 per cent. Moreover, the ratio of gross operating revenue to property investment has remained practically stationary since 1907, in spite of a constant increase in the volume of traffic. The ratio of net operating income to property investment was only 5.36 per cent in 1913, and gave every evidence of going as low as 4.35 per cent in 1914.

In view of this showing the Commission were agreed that the railroads were entitled to some increase in their revenues. The only questions were, whether the means proposed for affording this increase were reasonable, and whether the relief should be extended equally to all the roads in official classification territory. Upon these points the burden of proof was upon the carriers.³

Upon certain classes of heavy freight, namely, brick, tile, clay, coal, coke, starch, cement, iron ore, and plaster, in the transportation of which the use of larger cars has reduced operating costs, the proposed increases were refused as unreasonable. All increases in excess of five per cent, including the proposed minimum increase of five cents per ton in all rates stated in cents per ton not exceeding \$1.00, were also refused. With these exceptions, however, it was agreed that the proposed five per cent increase in rates was a reasonable means of securing the necessary additional revenue.

The Commission were divided, however, upon the question whether the relief granted should extend equally to all railroads in official classification territory. This territory is divided into three subdivisions for rate purposes. The first includes the New England states. The second, known as trunk line territory, includes the country west of New England to Buffalo and Pittsburg. The third extends from Buffalo and Pittsburg to the Mississippi River, and is known as central freight association territory. The majority of the Commission ruled that the proposed five per cent increase should be allowed only as to intraterritorial rates within central freight association territory.

The majority reached the conclusion that the lines in central freight association territory were operating at a disadvantage as to rates from a consideration of the relative financial strength of these roads as compared with trunk line systems, and from a comparison of the average ton-mile returns in the two sections. Thus, of the seventeen weakest systems with an average net income of only 2.15 per cent in 1913, and an average net corporate income, after deducting all fixed charges, equal to 0.12 per cent, fourteen were found in central freight association territory. While of the ten most prosperous roads in official classification territory the majority were trunk line roads. The average gross revenue per mile of line operated was found to be considerably lower on central freight association lines, while the average rate of return per ton-

³ U. S. COMPILED STATUTES, SUPPL. 1911, Tit. 56 a, Ch. 1, Sec. 15.

mile on traffic moving over these roads in 1913 was 5.63 mills, as compared with 6.46 mills in trunk line territory. The majority also produced figures to show that the class rates prevailing in central freight association territory were, in general, much lower than comparable rates in other parts of the country.

Commissioners McChord and Daniels, in dissenting opinions, while conceding that the roads in central freight association territory might be at some disadvantage, contended that this difference was equally explainable on other grounds than a difference in rates, and that it was not so great as to justify any discrimination against the trunk line systems. Moreover, it was strongly urged that for transportation purposes the country from the Atlantic seaboard to the Mississippi River must be treated as an industrial unit. Thus, it was pointed out that most of the rates in central freight association territory are based on the rate from Pittsburg to Chicago, which is, in turn, 60 per cent of the rate from New York to Chicago. To permit a general increase in one part of this district and refuse it in another meant the disruption of all these differentials to the disadvantage of many shippers. It was also urged that local traffic should not be compelled to bear the entire burden of furnishing additional revenue to the central freight association roads, while the rates on through traffic remained unchanged.

The general conclusion to be drawn from a consideration of this decision is, that the railroads have mistaken their remedy. What is needed, it seems, is not so much a "blanket" increase in rates, as a general readjustment of rates, with a view to eliminating many inconsistencies and unremunerative charges. Thus, it was pointed out by the majority that the railroads now perform many incidental services for shipper and passenger for which no additional charge, or an unremunerative charge, is made. A readjustment of rates would enable the railroads to increase their revenue and at the same time distribute the burden more nearly according to the benefit.⁴

Apropos of these suggestions it was pointed out that there is still considerable room for increased economy of operation. The Commission especially emphasized the possibilities of greater freight-car efficiency, economies in fuel consumption, stricter regulation of the practice of granting free transportation to employees and their families, and a closer scrutiny of contracts with supply and subsidiary companies in which railroad officials are interested.

The majority also laid considerable stress on the fact that the railroads made no request for an increase in passenger fares, although the passenger service contributes nearly one-fourth of their operating revenue, and although investigation by the Commission disclosed that this service was being conducted at a very low rate of return, and in some cases even at a loss. Until recently, however, it has been thought that the numerous state statutes fixing maximum rates for intrastate rates made it impossible for the railroads to increase their interstate fares. But the decision of the United States Supreme Court in the Shreveport Rate Case,⁵

⁴ For a more extended discussion of this phase of the rate problem see the *Industrial Railways Case*, 29 I. C. C. 212.

⁵ 234 U. S. 342. For a discussion of this case see article by Wm. C. Coleman in this issue, p. 34.

holding that intrastate freight rates imposed by a state railroad commission may be changed by the Interstate Commerce Commission when they interfere with the proper regulation of interstate commerce, indicates a possible solution of this difficulty.⁶

RECENT CASES

AGENCY — NATURE AND INCIDENTS OF RELATION — FATHER'S LIABILITY FOR TORTS OF SON. — The plaintiff was injured by the negligent running of the defendant's automobile by the defendant's son. The son habitually drove the car with his father's consent, and at the time of the accident was using it entirely for his own pleasure.

Held, that the defendant is liable on the principles of agency. *Davis v. Littlefield*, 81 S. E. 487 (S. C.).

Held, that the defendant is liable because an automobile is a dangerous instrumentality. *Hays v. Hogan*, 165 S. W. 1125 (Mo.).

Held, that the defendant is not liable. *Heissenbuttel v. Meagher*, 162 N. Y. App. Div. 752.

For a discussion of the principles involved, see NOTES, p. 91. See also 2 HARV. L. REV. 734.

AGENCY — PRINCIPAL'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR — LIABILITY FOR EXPLOSIVES. — The defendant hired an independent contractor to load a ship with dynamite. By the negligence of a servant of the independent contractor, the dynamite exploded, and the plaintiff was injured. *Held*, that the defendant is not liable. *State of Maryland v. General Stevedoring Co.*, 213 Fed. 51 (Dist. Ct., Md.).

The general rule that the employer is not liable for the negligence of an independent contractor is not applicable where the work, if done in the ordinary method, would be a nuisance. *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482. But the modern necessity for the manufacture and transportation of explosives has led the courts to refuse to impose absolute liability of this sort on the handlers of explosives. *The Ingrid*, 195 Fed. 596. The employer may also be held when the work undertaken by the independent contractor is inherently or intrinsically dangerous. *Doll v. Ribetti*, 203 Fed. 593; *Bower v. Peate*, L. R. 1 Q. B. D. 321. But the work must be so dangerous that injury probably will, and not merely may, result to third persons unless precautions are taken. *Davis v. Whiting & Son Co.*, 201 Mass. 91, 87 N. E. 199; *Bibb's Adm'r v. Norfolk & Western R. Co.*, 87 Va. 711, 725, 14 S. E. 163, 168. So if the danger lies solely in the possibility of some one doing an indefinite number of careless acts, the work will not be deemed intrinsically perilous. *Davis v. Whiting & Son Co.*, *supra*; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052. Whether the transportation of dynamite is inherently dangerous is a question of some nicety, and the court was doubtless guided by a consideration of modern expediency, as well as by scientific facts, in concluding that it is not.

ASSAULT AND BATTERY — CIVIL LIABILITY — DEFENSES: CONSENT OF VICTIM OF STATUTORY RAPE. — To have carnal knowledge of a female less than sixteen years of age, not the wife of the perpetrator, was made rape by statute. COMP. LAWS, OKLA. (1909), § 2414; LORD'S OREGON LAWS, § 1912.

⁶ The railroads in official classification territory have already filed with the Commission new tariffs increasing interstate passenger fares.

The plaintiff, a consenting victim of such a crime, sues the perpetrator. *Held*, that the plaintiff may recover. *Priboth v. Haveron*, 139 Pac. 973 (Okla.); *Hough v. Iderhoff*, 139 Pac. 931 (Ore.).

Both courts argue that consent is rendered legally impossible. This seems questionable. Although common law rape involves non-consent, it does not follow that in a statutory crime of the same name consent is legally non-existent while present in fact. See *Hardin v. State*, 39 Tex. Cr. R. 426, 431, 46 S. W. 803, 806. It is less fictitious and equally in harmony with the wording of the statutes cited to say that consent is made immaterial to criminal liability. The more satisfactory basis for the result is the reasoning underlying the well-established doctrine that the consent of either participant in an illegal mutual combat is no defense to an action by the other. *Bell v. Hansley*, 3 Jones (N. C.) 131; *Barholt v. Wright*, 45 Oh. St. 177, 12 N. E. 185. *Contra*, *Lykins v. Hamrick*, 144 Ky. 80, 137 S. W. 852. This rule appears to rest upon considerations of policy which render it supposedly inadvisable that consent to such a breach of the peace should remove all civil liability. *Stout v. Wren*, 1 Hawks (N. C.) 420. Such a conception is anomalous in civil law, where consent is normally a complete defense. But the courts have probably been influenced by the criminal-law principle that consent does not excuse an act which tends to a breach of the peace, or severe bodily harm, unless it negatives an essential element of the crime. If the doctrine of these mutual combat cases be accepted, as it must on authority, it seems *a fortiori* sound to allow an action to the immature victim of such a crime as that in the principal cases, where there has been an express legislative declaration of policy.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — MEASURE OF DAMAGES FOR DISCHARGE WITHOUT CAUSE. — An attorney was employed under a written contract to procure certain awards, his fees to be a percentage of the recovery. After having made material progress, he was discharged without cause. The client employed another lawyer who procured the awards. The original attorney now sues on the contract. *Held*, that he may recover the agreed compensation. *Martin v. Camp*, 161 N. Y. App. Div. 610.

A client may discharge his attorney at any time without cause. *In re Prospect Ave.*, 85 Hun 257, 32 N. Y. Supp. 1013. But such action merely dissolves the relation, and the client remains liable for the breach of the contract of retainer. *Texas v. White*, 10 Wall. (U. S.) 483. Where the fee is a fixed amount, or if contingent, has been rendered certain by subsequent events, as in the principal case, the attorney may recover the agreed compensation in full. *Carlisle v. Barnes*, 102 N. Y. App. Div. 573, 92 N. Y. Supp. 917; *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796. This measure of damages involves no departure from the usual rule of damages for breach of contract of employment, for it depends upon the impossibility of calculating the value of the contract to the attorney in any other way. Thus where the attorney would have been put to certain inevitable expenses in carrying out the rest of the contract, his recovery is reduced by that amount. *Brodie v. Watkins*, 33 Ark. 545. On the other hand, if the claim proves worthless after the discharge, an attorney engaged on a percentage basis is only entitled to nominal damages. *Swinmerton v. Monterey Co.*, 76 Cal. 113, 18 Pac. 135. But if the client recovers through the new counsel, or compromises the claim, it seems that the original attorney may sue at his option for the reasonable value of services rendered, instead of on the contract. *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

BAILMENTS — BAILOR AND BAILEE — LIABILITY OF BAILEE FOR ACTS OF SERVANT. — In pursuance of its contract to call for the plaintiff's car and care for it in its garage, the defendant company sent an employee for the car. This servant took it on a frolic of his own, and while acting outside the scope of his

employment negligently damaged the car in a collision. *Held*, that the defendant is liable. *Southern Garage Co. v. Brown*, 65 So. 400 (Ala.).

Under a contract of bailment which contains no special provision concerning the care required of the bailee, it is well settled that he need exercise only ordinary care, and if he has exercised such care, he is not liable for injury done by a third person. *Russell v. Koehler*, 66 Ill. 459. Injury done by a servant acting outside the scope of his employment would seem to be analogous to injury done by a third person. In cases where the act of the employee is criminal, such as the embezzlement of a special deposit by the cashier of a bank, the law is clear that the bailee is not liable. *Foster v. Essex Bank*, 17 Mass. 478. The principal case does not seem properly distinguishable from this class of cases and it must be regarded as wrong. It is also opposed to authority, as the opposite result has been reached both in this country and in England in earlier cases. *Evans v. A. L. Dyke Automobile Supply Co.*, 121 Mo. App. 266, 101 S. W. 1132; *Sanderson v. Collins*, [1904] 1 K. B. 628.

BILLS AND NOTES — DEFENSES — EXTENSION OF TIME TO PRINCIPAL JOINT MAKER — NEGOTIABLE INSTRUMENTS LAW. — The defendant signed a joint note as surety for his co-maker. The payee knew of the suretyship relation, but made a binding contract with the principal maker, extending the time of payment, without the knowledge of the defendant, and now sues him. *Held*, that the plaintiff may recover. *Cowan v. Ramsey*, 140 Pac. 501 (Ariz.).

A surety co-maker will be discharged, at common law, by a binding extension of time given the principal debtor by a holder with notice of the suretyship relation. *Pooley v. Harradine*, 7 E. & B. 431; *Horne v. Bodwell*, 5 Gray (Mass.) 457. The principal case decides that the Uniform Negotiable Instruments Law abrogates this rule and permits recovery against the surety. Section 120 of the act enumerates the different modes of discharging a party secondarily liable, including the case of extension of time to the principal debtor. But it is obvious that a surety co-maker, being "by the terms of the instrument absolutely required to pay the same," is primarily liable under section 192. Section 119 gives five ways of discharging the instrument without mentioning discharge by extension of time to the principal. It is argued, therefore, in the principal case that since the provision as to discharge by extension of time is included in the section dealing with the discharge of parties secondarily liable, and omitted from the section as to the discharge of the instrument, and hence parties primarily liable, the legislative intent was not to discharge parties primarily liable in this manner. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679; *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426. Such an inference would not seem necessary, however, since section 119 deals not with the discharge of parties to the instrument, but with the discharge of the instrument itself, and the discharge of the surety co-maker would not be a discharge of the instrument. Hence the omission of the provision as to extension of time would have no significance. By section 196, cases not provided for by the Negotiable Instruments Law are governed by the law merchant. The ordinary rules of suretyship would, therefore, apply to the principal case and the surety co-maker should be discharged by the extension of time. This result seems permissible by a fair construction of the statute, and would avoid overthrowing the established law of suretyship. *Farmers' Bank of Wickliffe v. Wickliffe*, 134 Ky. 627, 121 S. W. 498. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, p. 117.

BILLS AND NOTES — PAYMENT AND DISCHARGE — PAYMENT BY ANOMALOUS INDORSER. — The plaintiff indorsed the defendant's note for the accommodation of the payee, in ignorance of an equity in favor of the defendant.

At maturity the defendant refused payment, whereupon the plaintiff took up the note from a holder in due course, and sued the maker. The Uniform Negotiable Instruments Law, section 121, provides that, "where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties." *Held*, that the plaintiff can recover on the note, and that section 121 of the Uniform Negotiable Instruments Law does not apply. *Lill v. Gleason*, 142 Pac. 287 (Kan.).

At common law an anomalous indorser who took up an instrument at maturity acquired all the rights of the party from whom he took. *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864; *Moynihan v. M'Keon*, 16 N. Y. Misc. 343, 38 N. Y. Supp. 61; *Andrews v. Meadow*, 133 Ala. 442, 31 So. 971. Literally, this situation now seems to be controlled by section 121 of the Uniform Negotiable Instruments Law. If this section is applicable, the anomalous indorser having had no rights on the instrument to which he could be remitted, would be unable to recover thereon. Such a result has been reached. *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671. See *Noble v. Beeman, etc. Co.*, 65 Ore. 93, 107; 131 Pac. 1006, 1012. In both instances, however, the courts denied that they were applying section 121. The first decision, it is submitted, was warped by the exceptional Massachusetts doctrine, that an anomalous indorser was to be regarded as a co-maker, although this rule had already been abrogated by the adoption of the Negotiable Instruments Law. *Cf. Pray v. Maine*, 7 Cush. (Mass.) 253. In the principal case the provision for remitter to former rights in section 121 was construed, according to its obvious intention, as applicable only when the party secondarily liable had been himself connected with the title of the instrument. This interpretation reaches the proper result and its general adoption would accomplish uniformity without the necessity of amendment.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — PURCHASER WITH NOTICE FROM INNOCENT PLEDGEE. — The plaintiff purchased from an innocent pledgee for value a note given in violation of the Small Loans Act. He bought the note for less than its face value and with notice of the defense, and now sues the maker on the instrument. *Held*, that he may recover the full amount of the note. *Burnes v. New Mineral Fertilizer Co.*, 105 N. E. 1074 (Mass.).

It is agreed that at common law, in order to avoid circuity of action, the *bonâ fide* pledgee of a note to which the maker has a defense can recover only the amount of his loan. *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Yellowstone National Bank v. Gagnon*, 19 Mont. 402, 48 Pac. 762. See 11 HARV. L. REV. 194. But the rights of the transferee with notice from such a pledgee are not clear on authority. When the pledgor pledges his own notes, the purchaser from the pledgee with notice of the pledge is usually allowed recovery for only the amount of the pledge debt. *Peacock v. Phillips*, 155 Ill. App. 514. *Contra, In re Trust Estate of Woods, Weeks, & Co.*, 52 Md. 520. The purchaser's rights are likewise limited against an accommodation indorser of the pledgor's note. *Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842. *Cf. Security Bank v. Kingsland*, 5 N. D. 263, 65 N. W. 697. See COLEBROOKE, COLLATERAL SECURITIES, § 181. Logically, the principal case seems indistinguishable from the situation where the pledgor pledges his own notes. The purchaser derives his only rights from the pledgee and should be limited to the pledgee's rights. The principal case must be supported, if at all, on the ground that the saleability of the pledgee's security should not be impaired by such a limitation on his power of sale. Under the Negotiable Instruments Law, by section 27 a pledgee is made a holder for value only "to the extent of his lien," and the purchaser in this case is not a holder in due course in his own right within

section 52. But it may be argued that section 27 applies only when the pledgee is suing on the note himself and not when he has exercised a special right of sale.

CARRIERS — SLEEPING CARS — LIABILITY FOR LOSS OF BAGGAGE. — The plaintiff, a passenger on defendant's Pullman car, left his bag by the side of the berth when he went to sleep at night. When he awoke in the morning the bag was gone. *Held*, that these facts alone made out a *prima facie* case of negligence. *Goldstein v. Pullman Co.*, 147 N. Y. Supp. 133 (N. Y. App. Div.).

It is generally agreed that the liability of sleeping car companies for the loss of baggage is not that of insurers, but depends on negligence. See 16 HARV. L. REV. 367. Most of the authorities also require other evidence of negligence than the mere loss of the passenger's baggage. See BEALE, INNKEEPERS, § 392. A line of Georgia cases, none of which squarely decides the point, has been the only contrary authority heretofore. *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. 186; *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933. The principal case, however, apparently applies the dicta of these cases in full strictness, and holds that a *prima facie* case of negligence is made out by proving the passenger's loss of baggage on the sleeping car at night, without evidence of specific negligence on the part of the company. Such a doctrine seems a desirable development, for the situation is one where practically all the evidence is in the hands of the sleeping car company or its servants.

CONFLICT OF LAWS — SITUS OF CHOSSES IN ACTION — SITUS OF PROMISSORY NOTES FOR PURPOSES OF TAXATION. — A non-resident died out of the state, leaving in a New York safe deposit vault promissory notes made by residents of Virginia and Illinois. *Held*, that the notes are "property within the state" subject to transfer tax under NEW YORK LAWS OF 1905, c. 368, § 1. *Wheeler v. Sohmer*, 34 Sup. Ct. 607.

For purposes of assessment it is commonly stated that a debt has its situs at the creditor's domicile. *Kirtland v. Hotchkiss*, 100 U. S. 491. More accurately, the creditor personally is assessed according to the value of his personal assets, whatever their situs. See 27 HARV. L. REV. 107, 114. The truth is that a debt, as such, can have no actual situs. But from ancient times it has been the law that a debt represented by a specialty is situated where the bond is. *Byron v. Byron*, Croke Eliz. 472. *Commissioner of Stamps v. Hope*, [1891] A. C. 476. Four justices in the principal case extend this primitive conception to negotiable instruments, despite the contrary authority of *Buck v. Beach*, 206 U. S. 392. Five justices reject this view, but of these two concur in the decision, holding that New York has jurisdiction over the transfer of the notes, though their situs is elsewhere. *Blackstone v. Miller*, 188 U. S. 189. See *Buck v. Beach*, *supra*, 408. A negotiable instrument does in fact give the debt concrete form, and is considered tangible property for many purposes. See *New Orleans v. Stempel*, 175 U. S. 309. Moreover, it may be sold for cash anywhere by mere indorsement, and so has a marketable value at the place where the paper is located. *Blain v. Irby*, 25 Kan. 499. See 21 HARV. L. REV. 50. The leading opinion of the principal case has, therefore, both logical and practical justification. *Fisher v. Commissioners of Rush County*, 19 Kan. 414. *Contra*, *Yeoman v. Bradshaw*, Holt, 42. The concurring opinion is hard to justify, except by precedent. For artificial reasoning must be adopted to establish jurisdiction over a transfer of property owned by non-residents and assumed to be outside the state.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — PIPE-LINE AMENDMENT TO INTERSTATE COMMERCE ACT. — By an amendment to the Interstate Commerce Act of 1906, Congress provided that all pipe lines engaged in the inter-

state transportation of oil should be held common carriers. The act was construed to apply to all pipe lines which transported oil from other wells but their own, irrespective of whether they professed to carry for the public. *Held*, that the act, so construed, is constitutional. *United States v. Ohio Oil Co.*, 34 Sup. Ct. 956.

For a discussion of this case in the lower court, see 26 HARV. L. REV. 631. For an analysis in connection with the Insurance Rate Case, see NOTES, p. 84.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT — LEGISLATIVE MINIMUM WAGE FOR WOMEN AND MINORS. — A state legislature passed an act creating a commission to declare standards of conditions of labor, hours of labor and minimum wages for women and minor workers in any industry. Failure of an employer to comply with the standards thus to be imposed was made a misdemeanor. Suit was brought to enjoin enforcement of a ruling of the commission fixing a minimum wage for women employed in factories. *Held*, that the act is constitutional. *Stettler v. O'Hara*, 139 Pac. 743 (Ore.).

For a discussion of this case and a comparison of the principles involved in minimum wage and maximum hours statutes, see this issue of the REVIEW, p. 89.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: DELEGATION OF POWERS — DELEGATION OF POWER TO ADMINISTRATIVE OFFICIALS. — The Legislative Assembly of Porto Rico by statute levied a license tax on certain businesses and empowered the Insular Treasurer to classify each one of such businesses into one of five classes based on its importance and volume in comparison with other businesses. The defendant, an officer of a company taxable under this statute, refused to furnish the Treasurer with accounts necessary to assist him in his classification; whereupon mandamus was brought and resisted on the ground that the statute was unconstitutional. *Held*, that the writ of mandamus should be issued. *People of Porto Rico v. Neagle*, Sup. Ct. P. R., Aug. 1, 1914 (not yet reported).

For a discussion of the interesting question in administrative law here involved, see this issue of the REVIEW, p. 95.

CONSTITUTIONAL LAW — PRIVILEGES, IMMUNITIES AND CLASS LEGISLATION — VALIDITY OF STATE ANTI-TRUST ACT EXEMPTING COMBINATIONS OF LABOR. — The Missouri Anti-Trust Acts, as interpreted by the Supreme Court of the state, applied only to combinations of manufacturers and vendors and exempted associations of wage-earners from the statutory prohibitions against combinations to lessen competition and regulate prices. *Held*, that the statutes, as interpreted, do not violate the constitutional guaranty of equal protection of the laws. *International Harvester Co. v. Missouri*, 34 Sup. Ct. 859.

The Fourteenth Amendment does not prohibit a state legislature from passing acts regulating certain classes of persons and property and leaving others unregulated. *Soon Hing v. Crowley*, 113 U. S. 703. The laws may also operate differently upon the various classes, but the classification must be based upon a reasonable difference in the subjects of the legislation and must apply equally to all members of the classes defined. *Barbier v. Connolly*, 113 U. S. 27, 31. And it is not enough to invalidate the statute that the court does not think its policy a wise one. *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512. The difficulty arises in deciding when the legislative classification has become vicious. The older cases drew the line much more narrowly than we find it drawn in the principal case. Thus the Illinois Anti-Trust Act was declared

unconstitutional because it differentiated producers who sold, from other vendors. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. The spirit and reasoning of the two cases are quite different. The writer of the dissenting opinion in the earlier case now announces the view of the united court. The decision is to be supported on the ground, which the opinion takes, that a legislative classification should be upheld if within the bounds of reason.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO THE CONTRACT — SOLE BENEFICIARY — MASSACHUSETTS LAW. — The defendant's testator promised the father of an infant, in consideration of the naming of the child for him, to settle a sum of money on the infant. The child, by his father as next friend, sues upon this contract. *Held*, that he can recover. *Gardner v. Denison*, 105 N. E. 359 (Mass.).

This case is somewhat startling in Massachusetts, where a sole beneficiary cannot recover at law or in equity on the contract made for his benefit. *Mars-ton v. Bigelow*, 150 Mass. 45, 22 N. E. 71. In cases where a creditor is the beneficiary of a contract made by his debtor, Massachusetts has already retreated from her former strict position, and now allows the creditor to reach the contract in equity as an asset of the debtor. *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955. *Cf. Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469. See 25 HARV. L. REV. 289. In the principal case, in order to escape the severity of its rule concerning sole beneficiaries, the court says that the father in naming his new-born son acted as the contracting agent of the child. This is a return to the seventeenth-century reasoning which identified the child with its parent. *Dutton v. Poole*, 1 Vent. 318, 332. The clear-cut anomaly of a recovery by the sole beneficiary at law, such as exists in many American jurisdictions, is preferable to such a fiction. A recovery in equity would equally accomplish justice, and at the same time would be theoretically justifiable. See *Linneman v. Moross*, 98 Mich. 178, 182, 57 N. W. 103, 105; 15 HARV. L. REV. 773. In New York, however, the courts would permit recovery in the principal case on the curious theory that the moral obligation to support a dependent relative makes the contract one for the benefit of a creditor of the promisee. *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724.

EASEMENTS — MODES OF ACQUISITION — ASSUMPTION OF EASEMENT BY ALLEGED DOMINANT OWNER. — The owner of certain lake-front property sold a portion of his land to the plaintiff city with full knowledge of the latter's purpose to install forthwith a pumping station and supply its inhabitants with drinking water. The grantor thereafter sold the remainder of his property to the defendant, who had constructive notice of the use to which the plaintiff's land was being put. The plaintiff now asks for an injunction against any user of the lake by the defendant for bathing purposes, which was granted. *Held*, on appeal, by an equally divided court, that the plaintiff is entitled to the relief sought. *City of Battle Creek v. Gogunac Resort Ass'n*, 148 N. W. 441 (Mich.).

Many decisions, recognizing easements created without grant, while based in terms on estoppel, can be rested on the sounder equitable doctrine that part performance may take a contract out of the Statute of Frauds. *East India Co. v. Vincent*, 2 Atk. 83. But in the principal case it seems scarcely possible to contend that there was any contract for an easement, especially against the defendant, a stranger to the original conveyance. Equity also recognizes servitudes which because of lack of privity, or because of some informality in the necessary covenant, do not run at law. *Tulk v. Moxhay*, 11 Beav. 571. In the principal case, however, aside from the lack of any attempted covenant, there is no clear intent to benefit the dominant tenement, an element deemed equally essential to an equitable servitude. See *Keates v.*

Lyon, L. R. 4 Ch. App. 218, 224. In some jurisdictions equity has even taken the extreme step of allowing the creation of easements by parol license. *Reick v. Kern*, 14 S. & R. (Pa.) 267; *Rhodes v. Otis*, 33 Ala. 578; *Rochdale Canal Company v. King*, 22 L. J. Ch. n. s. 604. *Contra*, *National Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Ewing v. Rhea*, 37 Ore. 583, 62 Pac. 790. This doctrine marks a clean break from the common law, in which it can find little justification. The principal case goes even farther, in that there is here no license, and so the basis on which the doctrine usually proceeds is lacking. Nor is there any misrepresentation. The alleged servient owner's conduct was throughout consistent with the assumption that the city was thereafter to acquire water rights by condemnation. The decision tends to secure municipalities from the carelessness of their legal advisers, but it is otherwise to be regretted.

EVIDENCE — DECLARATIONS CONCERNING PEDIGREE — REQUISITE CONNECTION WITH THE FAMILY. — To prove his claim to the deceased's property, the petitioner offered declarations of his mother that she married the father of the deceased. There was no evidence of the relationship between the declarant and the deceased other than these declarations. *Held*, that the declarations are not admissible. *Aalholm v. People*, 105 N. E. 647 (N. Y.).

All the courts agree that the declarant's connection with the family must be proved by independent evidence in order to bring his declarations within the pedigree exception to the hearsay rule. *Banbury Peerage Case*, 2 Selw. N. P. 764. But there has been a wide difference of judicial opinion with respect to the meaning of "the family." The deceased's family, of course, is the one primarily concerned with the question of inheritance, but a marriage between representatives of the two families is none the less a fact in the family history of both. The broader, and what has appeared to be the prevailing view, has therefore been satisfied with proof of the declarant's relationship to either family. *Monkton v. Attorney-General*, 2 Russ. & M. 147; *Siller v. Gehr*, 105 Pa. 577. Dean Wigmore has lent his weighty support to this view, and has severely criticised its opponents. See WIGMORE, EVIDENCE, § 1491. The narrower rule requires independent proof of the declarant's membership in the family whose inheritance is in dispute. *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175. The declarations offered in the principal case give an excellent illustration of the dangers of manufactured evidence involved in the more liberal rule, which would make possible the establishment of a claim by the claimant's own testimony to the assertions of deceased members of his family. Such considerations go far to justify the court's adoption of the more conservative view, and its decision in favor of a doctrine somewhat discredited in the past would seem likely to determine the trend of future American authority.

EVIDENCE — STATEMENTS IN PUBLIC DOCUMENTS — POST-OFFICE RECORDS. — To prove the time at which a telegram was delivered, records kept by the post-office officials showing the times of the receipt and delivery of telegrams were offered. These records were preserved only for a limited time, and were used chiefly for calculating the messenger boys' fees. The absence of the entrant was not accounted for. *Held*, that the records are not admissible. *Heyne v. Fischel*, 110 L. T. R. 264 (K. B. Div.).

The court holds that the absence of any opportunity for inspection by the public was a fatal objection to the admission of these records under the public document exception to the hearsay rule. This doctrine seems well established in England, on the ground that publicity reduces the probability of error. *Sturla v. Freccia*, L. R. 5 A. C. 623, 643. This reasoning, however, merely points out a possible advantage from public access, of small moment because

of the fixed requirement that the record must be kept in discharge of official duty, and it is submitted that the limitation is not a desirable one. In the United States it has never been definitely accepted. See WIGMORE, EVIDENCE, § 1634. But the second objection taken by the court, that the records were only for a temporary purpose and not of a permanent character, is valid, and on this point the principal case may be supported. *Hegler v. Faulkner*, 153 U. S. 109. In the United States, post-office records have been generally considered within the public document exception. *Gurney v. Howe*, 9 Gray (Mass.) 404. But the records admitted are kept by the direction of the Post-Office Department and the postmaster is bound to see that they are correct and to certify the facts to the Department. See *Miller v. Boykin*, 70 Ala. 469, 478. The records in the principal case would perhaps be more properly admissible under the entry in the course of business exception to the hearsay rule. But failure to account for the absence of the entrant is conclusive against this possibility. See WIGMORE, EVIDENCE, § 1521.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION — INDEBTEDNESS OF HEIR TO ESTATE AS LIEN ON HIS SHARE OF THE REALTY. — An heir owed the estate more than the value of his distributive share of the real estate. After the Probate Court had refused the indebted heir participation in the distribution thereof, judgment creditors of this heir levied on his alleged interest in the realty. The other heirs brought a bill in equity for a decree to quiet their title to such real estate, free from any lien on the part of the judgment creditors. *Held*, that the relief should be granted. *Stenson v. Halvorson*, 147 N. W. 800 (N. D.).

It is considered that the indebtedness constitutes a prior equitable lien upon the debtor's distributive share of the real estate. Admittedly personal property, which vested in the administrator, could be charged with a distributee's indebtedness, but at common law the rule was clearly otherwise as to realty, which passed directly to the heir free of all charges. See *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533, 547; 9 HARV. L. REV. 157. But under modern statutes, such as that in the principal case, which treat real and personal property alike, as descendible subject to administration, many courts have stretched a point to allow the administrator to withhold real estate from an indebted heir. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686; *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7. This result is not without vigorous dissent. *Marvin v. Bowlby* 142 Mich. 245, 105 N. W. 751; *La Foy v. La Foy*, 43 N. J. Eq. 206, 10 Atl. 266. Some courts distinguish between real estate and surplus proceeds in administrator's hands from the sale thereof. *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362. This distinction is probably unsound, for such funds are not personal assets, but in equity are still realty, subject to the lien of judgment creditors of the heir. Cf. *Simonds v. Harris*, 92 Ind. 505. See *Streety v. McCurdy*, *supra*, 687. The principal case reaches an equitable and practical result, and agrees with the modern tendency to abolish the artificial difference in the administration of intestate real and personal property.

FIXTURES — REMOVAL — EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL. — A tenant in possession installed agricultural fixtures with the understanding that he should have the right to remove them. Subsequently he took out a new lease, which described the premises in general terms and reserved no right to remove the articles affixed. There was in addition a covenant to yield up the premises in as good repair as when taken. The landlord now sues the tenant for removing the fixtures. *Held*, that he cannot recover. *Sassen v. Haegle*, 147 N. W. 445 (Minn.).

The court speaks as though the fixtures remained personalty. Grant this, and tenant's right of removal is unquestionable. Probably, however, the court

only confuses the nature of the tenant's right, which is historically a privilege of severance from the realty that the law has come to allow tenants during their terms. This confusion is frequently made. *Kerr v. Kingsbury*, 39 Mich. 150. Considering the fixtures, then, as realty, the present weight of authority holds that the tenant, by accepting a new lease without reserving his right of removal, conclusively indicates his intention to abandon that right and treat the fixtures as an inseparable part of the premises newly demised. *Carlin v. Rittler*, 68 Ind. 418, 13 Atl. 370; *Watriss v. First Bank of Cambridge*, 124 Mass. 571; *Sanitary District v. Cook*, 169 Ill. 184, 48 N. E. 461. But the obvious hardship of this doctrine has led many courts to repudiate it altogether, or to whittle down the scope of its operation. *Kerr v. Kingsbury*, *supra*; *Second National Bank v. Merrill*, 69 Wis. 501. Cf. *Red Diamond Clothing Co. v. Steidemann*, 169 Mo. App. 306, 152 S. W. 609. *Bernheimer v. Adams*, 70 N. Y. App. Div. 114. See 15 HARV. L. REV. 853. Moreover, the doctrine is never applied in the analogous case of a tenant holding over by mere informal agreement. *Crandall Investment Co. v. Ulyatt*, 40 Col. 35. As the right of severance during the original term depended upon no stipulation in the lease, the majority rule is peculiarly deceptive. The juster test is one of intention, deduced by interpreting the lease in the light of all the circumstances — not merely inferred from the isolated fact that tenant technically "delivered up possession" under the old tenancy without reserving his right of severance. *Wright v. MacDonnell*, 88 Tex. 140, 30 S. W. 907.

HUSBAND AND WIFE — RIGHTS OF WIFE AGAINST HUSBAND — WIFE'S RIGHT TO SUE HUSBAND FOR PERSONAL TORTS. — A wife sued her husband for assault and battery under a statute providing that married women shall retain the same legal existence and legal personality after marriage as before marriage. *Held*, that the wife can recover. *Fiedeer v. Fiedeer*, 140 Pac. 1022 (Okla.).

A wife sued her husband for assault, battery and false imprisonment under a statute placing husband and wife on separate bases with respect to their property. *Held*, that the wife can recover. *Brown v. Brown*, 89 Atl. 889 (Conn.).

At common law the unity of husband and wife prevented either from maintaining an action against the other. *Phillips v. Barnet*, L. R. 1 Q. B. D. 436. See STEWART, HUSBAND AND WIFE, § 48. Even under married woman's acts the tendency has been to deny wives the right to sue their husbands for personal injuries on the ground that the statutes do not make this change in the common law specifically and so cannot be presumed to have intended it. *Freethy v. Freethy*, 42 Barb. (N. Y.) 641; *Thompson v. Thompson*, 218 U. S. 611; *Schultz v. Schultz*, 89 N. Y. 644, overruling *Schultz v. Schultz*, 27 Hun (N. Y.) 26. A supposed public policy against aggravating domestic troubles by bringing them into the public courtroom, has been partly responsible for this narrow interpretation of the statutes. *Longendyke v. Longendyke*, 44 Barb. (N. Y.) 366. Strangely enough, however, actions between husband and wife for torts to property seem generally to be permitted. *Smith v. Smith*, 20 R. I. 556, 40 Atl. 417; *Mason v. Mason*, 66 Hun (N. Y.) 386, 21 N. Y. Supp. 366; *Carpenter v. Carpenter*, 154 Mich. 100, 117 N. W. 598. At present a change seems to be taking place in the law. Courts deprecate the fact that they are bound by authority to the earlier rule. See *Abbe v. Abbe*, 22 App. Div. (N. Y.) 483, 48 N. Y. Supp. 25; *Sykes v. Speer*, 112 S. W. 422 (Tex. Civ. App.). The principal cases represent the latest view, namely, that these statutes amount to fundamental legislation changing the status of married women completely and that the right to maintain actions against their husbands for torts is simply a logical consequence of this new status. Against the adoption of this broader interpretation, the decisions find no public policy,

contending that the right of wives to recover damages for personal injuries inflicted by their husbands will restrain rather than foster domestic discord.

INJUNCTIONS — NATURE AND SCOPE OF THE REMEDY — DISCRETION OF THE COURT TO REFUSE RELIEF ON GROUNDS OF PUBLIC CONVENIENCE. — Under a municipal franchise ordinance a company had permission to lay pipes in the street to conduct gas for heating purposes; but the ordinance expressly prohibited the use of the streets to supply gas for lighting purposes, in competition with the municipal lighting plant. The gas service given by the city was poor in quality. The city asked for an injunction restraining the company from supplying gas for lighting purposes, in violation of its franchise. *Held*, that the injunction should not be granted, because of the inconvenience it would cause to the public. *City of Wheeling v. Natural Gas Co. of West Virginia*, 82 S. E. 345 (W. Va.).

A court of equity may consider the convenience and interests of others than the litigants in exercising its discretion whether to grant its extraordinary relief by way of injunction. *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Conger v. New York, W. S. & B. R. Co.*, 120 N. Y. 29, 23 N. E. 983. Thus one court refused relief to a water company whose exclusive franchise was being unlawfully invaded by a rival company, on the ground that the city needed the extra water supply. *Stein v. Bienville Water Supply Co.*, 32 Fed. 876. Another court refused to protect by injunction a factory owner, whose water supply was unlawfully diverted by a canal company, because of the importance of the canal as an artery of commerce. *Cameron Furnace Co. v. Pennsylvania Canal Co.*, 2 Pears. (Pa.) 209. Riparian land owners were denied relief against the pollution of the stream by a municipal sewer system on similar grounds. *Grey v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995. In England there is a tendency, however, not to permit questions of public convenience to interfere where the parties are otherwise clearly entitled to relief. *Lloyd v. London, Chatham and Dover Ry. Co.*, 34 L. J., Ch. 401. Indeed, the power to do so was vigorously denied by Lord Cranworth. See *Broadbent v. Imperial Gaslight Co.*, 26 L. J., Ch. 276, 283. But see *Woods v. Charing Cross Ry. Co.*, 33 Beav. 290. American courts are more liberal in this regard. *Johnson v. United Railways Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63. *Cumming v. Board of Education*, 175 U. S. 528. The principal case is a striking example of the flexibility which this discretionary power gives to equitable procedure. *Newport v. Newport Light Co.*, 14 Ky. 845, 21 S. W. 645.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — POWER OF THE COMMISSION TO FIX RATES. — In accordance with the provisions of the long and short-haul clause of the Act to Regulate Commerce, as amended, which provides that a carrier may not lawfully charge greater compensation for a shorter than for a longer haul over the same line, except when authorized by the Interstate Commerce Commission, seventeen carriers applied to the Commission for permission to continue the rates then in force, which involved higher rates to intermediate points than for the longer haul through to the coast. The Commission refused to grant this petition unqualifiedly, but entered an order dividing the country into zones and permitting a higher rate for the shorter haul, provided that a proportionate relation between the rates was maintained according to a percentage fixed by the Commission for each zone. The carriers refused to obey this order and commenced proceedings to enjoin the enforcement of the section, as unconstitutional, and in any event, of the order, as invalid under a proper construction of the amended section. *Held*, that the section is constitutional, and that the order does not exceed the powers conferred by it on the Commission. *The Intermountain Rate Cases*, 234 U. S. 476.

The courts made the original long and short-haul clause to a large extent ineffective by construing the phrase "under substantially similar circumstances and conditions" so that competition entitled the carrier to charge a lower rate for the longer haul without original authorization from the Commission. *Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144. This phrase was struck out by the 1910 amendments and the principal case deals with the constitutionality and effect of the amended section. See 36 U. S. STAT. AT LARGE, 547. Undoubtedly the power to fix and regulate rates was one which Congress might constitutionally exercise, but the vital question concerns the validity of the delegation of this power to the Commission. Under modern conditions, with the increasing exercise of the federal power over commerce, it has become necessary and desirable for Congress to act to a large extent through such administrative tribunals. See this issue of the REVIEW, p. 95. To deny the constitutionality of such delegation would seriously impair effective federal control. That the section of the Commerce Act in question makes a real delegation of legislative power to the Commission seems indubitable, and the delegation extends further than any previous cases, in that Congress imposes no standard but the general scope and purposes of the act, a standard so vague as to amount in practice to nothing more than the discretion of the Commission itself. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361. The nearest approach to the principal case is the line of cases holding that Congress may empower the Secretary of War to order the removal of obstructions to navigation. *Union Bridge Co. v. United States*, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177. But the statute in these cases does not attempt to delegate nearly as extensive powers as the Commerce Act, for it lays down a fairly definite standard and empowers the Secretary to determine whether it applies to the particular circumstances. 30 U. S. STAT. AT LARGE, 1121, 1153. In sustaining the constitutionality of the clause involved in the principal case, therefore, the Supreme Court has allowed the delegation of very broad powers, and the decision will surely lead to further delegations to administrative bodies in time to come. The opinion of the court purports to introduce no new principle, and in failing to face the issue squarely, it is somewhat unsatisfactory. A more definite pronouncement on the subject may be hoped for in the near future.

MASTER AND SERVANT — WORKMAN'S COMPENSATION ACTS — WHETHER OCCUPATIONAL DISEASE IS AN "ACCIDENT." — The plaintiff's husband died from lead poisoning as a result of continuous exposure to red lead in the defendant's factory. The Workmen's Compensation Act of Michigan provides for compensation for "personal injuries," but in the title and in other parts of the act, "accidents" is the only word used. There is also a provision for notice "within ten days after the occurrence of the accident." *Held*, that the plaintiff is not entitled to compensation. *Adams v. Acme White Lead & Color Works*, 148 N. W. 485 (Mich.).

For a discussion of the question involved, see 27 HARV. L. REV. 766. The Massachusetts case there commented on may be reconciled with the principal case on the ground that the statute there speaks of "injuries," instead of "accidents," and contains no provision requiring the date of the injury to be definitely proved. Phraseology similar to that of the Michigan statute has led to the same result in England as in the Michigan case. *Broderick v. London County Council*, [1908] 2 K. B. 807.

NEGLECT — DUTY OF CARE — VIOLATION OF TENEMENT HOUSE STATUTE REQUIRING FIRE ESCAPES. — A statute required that all tenement houses of

a certain class should be provided with fire escapes, but unlike the previous act gave no civil action for a breach. The defendant inherited a tenement not properly equipped, and, in a fire a month later, the plaintiff's wife was killed as a result of the absence of fire escapes. The plaintiff sued for negligence, but was allowed to amend and substitute the non-performance of statutory duty as the basis of his action. *Held*, that he cannot recover on that theory. *Evers v. Davis*, 90 Atl. 677 (N. J. Ct. Err. and App.).

In this case the court's opinion closely follows and quotes at length from Dean Thayer's article in a recent issue of the REVIEW. See 27 HARV. L. REV. 317. It states admirably that in the absence of an express statutory provision for civil action, recovery for a breach of the statute depends on common law principles of negligence. But the statute in question prescribed an affirmative duty, and its violation was a nonfeasance, so that evident legislative intention to create a new private duty toward those for whose benefit the statute was passed is essential. *Cowley v. Newmarket Local Board*, [1892] A. C. 345. In view of the omission of the former act's provision for civil remedy, it may well be doubted whether the legislature intended to impose any duty on the landlord in favor of the tenant or his family and change the common-law rule of no liability for open defects of the premises to that extent. See *Land v. Fitzgerald*, 68 N. J. L. 28. *Cf. Willy v. Mulledy*, 78 N. Y. 310. The statute may conceivably be regarded, however, as stamping the maintenance of such tenements without fire escapes as dangerous conduct, so that the landlord would be guilty of positive wrong, and liable for his negligence in disregarding the legislative warning. See *Dawson & Co. v. Bingley Urban District Council*, [1911] 2 K. B. 149, 159. The fact that in the principal case the landlord inherited the premises only a month before the fire, suggests another interesting question, on which there is no direct authority. The nearest analogy is the case of a public officer, excused from the performance of a statutory duty because the necessary means were not furnished him. See *Weise v. Tate*, 45 Ill. App. 311. It would seem likewise proper to deny recovery against one who has made every reasonable effort to comply with the statute, but has failed because of lack of time. For his conduct has been that of a reasonable prudent man with reference to the statute.

POLICE POWER — INTEREST OF PUBLIC HEALTH — CONSTITUTIONALITY OF EUGENIC MARRIAGE LAWS. — A Wisconsin statute forbids the county clerk to issue a marriage certificate to any male applicant who does not produce a physician's certificate stating the applicant to be free from acquired venereal diseases, and provides that the physician's fee for such examination shall not exceed three dollars. *Held*, that the statute is constitutional. *Peterson v. Widule*, 147 N. W. 966 (Wis.).

A discussion of the case in the lower court will be found in 27 HARV. L. REV. 573. Under the upper court's construction of the statute, it does not require a laboratory test as the basis of the certificate, and the law therefore ceased to be objectionable as an unreasonable restriction on the right to marry.

POLICE POWER — NATURE AND EXTENT — FEDERAL PROTECTION OF MIGRATORY BIRDS. — An act of Congress declared that migratory birds were under the protection of the federal government and authorized the Department of Agriculture to make regulations in regard to hunting them. The defendant, indicted for violation of one of these regulations, challenges the constitutionality of the act. *Held*, that the act is unconstitutional. *United States v. Shauver*, 214 Fed. 154 (Dist. Ct., E. D., Ark.).

As representative of the people, each state controls fish and game within its borders. *Geer v. Connecticut*, 161 U. S. 519; *In re Mattson*, 69 Fed. 535. But when game leaves the state, its sovereignty ceases. See *Behring Sea Ar-*

bitrators' Decision, 32 AM. L. REG. 909. Game that migrates from state to state is thus constantly passing from the sovereignty of one state into that of another. Such a situation could be most effectively regulated by the federal government, but it seems clear that the statute in the principal case is beyond its powers. The federal government does not have sovereignty over the game, neither is there any legal principle authorizing the nation to assume powers because it can exercise them better than the states. Moreover, though the federal power over interstate commerce covers more than mere sales, and might conceivably come to include journeyings of citizens from state to state, the step from that to the uncontrolled movements of wild game is a very long one. It would seem that the worthy purpose of this statute must be carried out in some other way, either by exercise of the taxing power or by constitutional amendment.

POLICE POWER — REGULATION OF TRADES, PROFESSIONS AND BUSINESS — REGULATION OF RATES: FIRE INSURANCE. — A Kansas statute (Session Laws of 1909, c. 152, § 3) authorized the superintendent of insurance to establish reasonable rates for fire insurance companies. *Held*, that it is constitutional. *German Alliance Ins. Co. v. Lewis*, 34 Sup. Ct. 612.

For a discussion of the principles involved, see NOTES, p. 84.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — TELEPHONE COMPANIES: COMMISSION'S ORDER COMPELLING PHYSICAL CONNECTIONS. — The plaintiff company, operating long distance telephone lines in various states and maintaining a limited telephone service in a hotel, was ordered by the Oregon railroad commission to make physical connection with a local telephone company which had telephones in each room of the hotel so that both systems might be used interchangeably by the hotel. *Held*, that the order is valid. *Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666 (Dist. Ct., Ore.).

This case supports the correct view, that the order is to be sustained as a reasonable regulation of undertakings affected with a public interest, and not held void as an attempted exercise of the power of eminent domain without proper compensation. For a criticism of a contrary case, see 27 HARV. L. REV. 687.

RAILROADS — REGULATION OF RATES — POWER OF INTERSTATE COMMERCE COMMISSION OVER INTRASTATE RATES — "SHREVEPORT RATE CASES." — Railroads running between Shreveport, La., and Houston and Dallas, Tex., maintained higher rates between Shreveport and Texas points than for corresponding distances within Texas. The Interstate Commerce Commission found that this constituted unjust discrimination in favor of intrastate traffic. It then fixed maximum interstate rates, and ordered the carriers to equalize their intrastate and interstate rates. The Railroad Commission of Texas had established intrastate rates lower than the new maximum rates, and the Commerce Court held, on appeal, that the carriers could disregard this intrastate schedule, and increase those rates to correspond with the order. The carriers then attacked the validity of the order in the Supreme Court. *Held*, that the order be sustained. *Houston, E. & W. T. Ry. Co. v. United States*, 234 U. S. 342.

The court upholds the order as within the power of the Interstate Commerce Commission to regulate the relation between interstate and intrastate rates so as to prevent unjust discrimination against interstate commerce. For a discussion of the questions involved, see an article on page 34 of this issue of the REVIEW. Similar questions were discussed in the comment and leading article on the Minnesota Rate Cases. See 24 HARV. L. REV. 679; 27 *id.* 14.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — "INTERNATIONAL HARVESTER CASE." — A petition for dissolution was brought by the United States against the International Harvester Co. alleging that the corporation constituted a combination in restraint of trade and a monopoly. The Company had been organized in 1902 out of six independent and competing companies, and controlled between 80 and 85 per cent of the harvesting machinery output. No attempt to control prices, stifle competitors, or interfere otherwise with trade was proved. *Held*, that the defendant be dissolved. *United States v. International Harvester Co.*, 214 Fed. 987 (Dist. Ct., Minn.).

The question of whether this case is a proper application of the rule laid down in the Standard Oil and Tobacco Cases, is taken up in this issue of the REVIEW, p. 87.

SALES — RISK OF LOSS — EFFECT OF BUYER'S RIGHT OF INSPECTION. — The plaintiff agreed to sell and deliver a consignment of boxes f.o.b. place of shipment, and shipped the goods in conformity with the contract. Before the buyer had had opportunity to inspect the boxes, they were washed overboard and destroyed. The plaintiff now sues for the price of the goods. *Held*, that he can recover. *Skinner v. James Griffiths & Sons*, 141 Pac. 692 (Wash.).

On sales of goods which the seller is authorized to deliver to a carrier, title passes to the buyer on delivery to the carrier, if delivery is made in accordance with the authority given. The buyer's right of inspection then serves to determine whether title has so passed, and operates as a condition precedent, not to the passing of title, but merely to the payment of the price. *Murphy v. Sagola Lumber Co.*, 125 Wis. 363, 103 N. W. 1113. See WILLISTON, SALES, §§ 278, 473. Cf. *Giffen v. Selma Fruit Co.*, 5 Cal. App. 50, 84 Pac. 885. The risk of loss is therefore on the buyer, if the seller has shipped in conformity with the contract, although the buyer has been unable to inspect. *Magee v. Billingsley*, 3 Ala. 679, 698; *Virginia Kid Co. v. New Castle Leather Co.*, 89 Atl. 367 (Del.). The principal case is an unusually clear statement of this rule, which is now generally adopted. Cases where delivery is to be made to the buyer must, however, be distinguished. For there the buyer's assent to take delivery is essential, and his right of inspection operates as a condition precedent to the transfer of title. *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687. Again, there is authority declaring that where there is express reservation of the right of inspection, title does not pass until inspection by the buyer. *Phoenix Packing Co. v. Humphrey Ball Co.*, 58 Wash. 396, 401, 108 Pac. 952, 954. See *Livesley v. Johnston*, 45 Ore. 30, 43, 76 Pac. 946, 949.

But these cases construe the reservation as a reservation of the passage of title and do not deny the general principle.

SALES — TIME OF PASSING OF TITLE — SALE OF STANDING TREES. — The defendant executed an instrument under seal which purported to sell growing trees to the plaintiff and to give him two years in which to cut and remove them. At the expiration of the period, the defendant claimed the timber, cut, but not removed. The plaintiff brought trover against the defendant. *Held*, that he cannot recover on the ground that title passed only to timber removed within the period limited. *Smith v. Ramsey*, 82 S. E. 189 (Va.).

Under a similar agreement the vendee removed timber after the time limit had expired. The vendor brought suit for the timber so removed. *Held*, that he can recover, on the ground that the vendee's title was subject to defeasance as to timber not removed within the term. *Bond v. Ungerecht*, 167 S. W. 1116 (Tenn.).

Instruments of sale of standing trees, containing a clause limiting the time in which the vendee may cut and remove them, have been given various constructions. On one view, the clause is a covenant and absolute title passes.

Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 42 So. 858. If timber is removed after the period, the vendor's remedy is for breach of covenant or in trespass, but the value of the trees is not a part of the damages. Courts of equity however will not require the vendor to permit the trespass. *Peirce v. Finerty*, 76 N. H. 38, 76 Atl. 194. Support has been given this construction because it is claimed that no forfeiture is involved. See 17 HARV. L. REV. 411. A second view, that of the Virginia case, regards the clause as a condition precedent with title passing only to those trees cut and removed within the period. *Boisaubin v. Reed*, 2 Keyes (N. Y.) 323, 1 Abb. Dec. 161. This is scarcely the intention of the parties as expressed in the absolute terms of the conveyance. The Tennessee case adopted the third, and most preferable view, that the clause is a condition subsequent and that title passes subject to defeasance as to timber not removed within the time limit. *Allen & Nelsom Mill Co. v. Vaughn*, 57 Wash. 163, 106 Pac. 622. This construction fulfils the intention of the parties without violating the language of the instrument and avoids a situation where a legal title can only be asserted by means of a trespass.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — STATE TAXATION ON THE PROCEEDS OF INTERSTATE COMMERCE. — A Texas statute [ACT 30th, LEG. (1st Ex. Sess.) c. 18] imposed upon each terminal company doing business in the state "an occupation tax" "equal to one per cent of the total amount of its gross receipts from all sources whatever." This tax was stated to be in excess of all other taxes, but those paying it were to be relieved from the operation of former enactments imposing "occupation" taxes and a tax upon intangible assets. Defendant, an interstate company, contests the tax. Held, that the statute is constitutional. *State v. Houston Belt & Terminal Ry. Co.*, 166 S. W. 83 (Tex. Civ. App.).

For a discussion of this case in the light of the various United States Supreme Court holdings on the subject, see NOTES, p. 93.

WITNESSES — COMPETENCY — COMPETENCY OF A PRESIDING JUDGE AS WITNESS. — One of the presiding justices voluntarily took the stand and testified why a certain licensing committee, of which he had been a member, had referred the hearing to the body then sitting. Held, that the refusal of the license be affirmed. *Semble*, that the justice was not a competent witness. *Mitchell v. Justices of Croydon*, 30 T. L. R. 526, 20 Wkly. Notes, 225.

A judge may always testify in a cause where he is not sitting, as to the proceedings before him at another trial. *State v. Duffy*, 57 Conn. 525, 18 Atl. 791. But a judge cannot be required to give testimony at a trial over which he presides. *State v. De Maio*, 69 N. J. L. 590, 55 Atl. 644; *Reno Mill & Lumber Co. v. Westerfield*, 26 Nev. 332, 67 Pac. 961, 69 Pac. 899. Early English practice, however, seems to have considered a presiding judge a competent witness. *Trial of Oates*, 10 How. St. Tr. 1079, 1142; *Trial of Stafford*, 7 How. St. Tr. 1293, 1413, 1442. Subsequently doubts as to the propriety of this were expressed. See *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 H. L. 418, 433; *Rebina v. Petrie*, 20 Ont. 317, 323. In America, in the absence of statutes, the weight of authority is that one of the presiding justices is not a competent witness. *Morss v. Morss*, 11 Barb. (N. Y.) 510. Various reasons have been given, among others, that there would be no one to swear him, that he would have to pass on the admissibility of his own evidence, and that he could not be held for contempt. *Baker v. Thompson*, 89 Ga. 486, 15 S. E. 644; *Mariland v. Zanga*, 14 Wash. 92, 44 Pac. 117; *People v. Miller*, 2 Park. Cr. (N. Y.) 197. But statutes in many states allow the judge to testify. See CHAMBERLAYNE, EVIDENCE, p. 747. It is then at his discretion to proceed, or to suspend the trial until another judge can be secured. *State v. Houghton*, 45 Ore. 110, 75

Pac. 887. The principal case, it is true, is confessedly based on no direct authority in England. But, in general, assumption of the dual capacity of judge and witness seems absolutely improper. But see WIGMORE, EVIDENCE, § 1909.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN: WAIVER BY ALLOWING ONE OF SEVERAL PHYSICIANS TO TESTIFY. — The prosecutrix permitted one of three physicians who had treated her for the same trouble at about the same time to testify concerning the nature of her ailment. The defense then offered, over the objection of the state, the testimony of the other two physicians on the same point. *Held*, that the privilege had been waived. *State v. Long*, 165 S. W. 748 (Mo.).

The court takes the position that by permitting one of her physicians to testify as to the nature of her ailment, the patient abandoned her privilege as to all physicians who treated her for the same trouble. It is true that by allowing his physician to testify, the patient waives his privilege as to that physician at this and probably at subsequent trials. *Marquardt v. Brooklyn Heights R. Co.*, 126 App. Div. 272, 110 N. Y. Supp. 657; *McKinney v. Grand Street P. P. & F. R. Co.*, 104 N. Y. 352, 10 N. E. 544. And calling one of several consulting physicians will work a waiver of the privilege as to all present at the consultation. *Morris v. New York, O. & W. Ry Co.*, 148 N. Y. 88, 42 N. E. 410. None of these cases, however, justifies the result reached in the principal case. The mere preservation of secrecy is not the sole object of the privilege, else the courts would not generally agree that the patient may himself make public the nature of his ailment without thereby waiving the privilege. *McConnell v. City of Osage*, 80 Ia. 293, 45 N. W. 550. *Cf. Epstein v. Pennsylvania Ry. Co.*, 250 Mo. 1, 156 S. W. 699. Its true purpose is to protect confidential communications between physician and patient. The effective protection of such confidences requires that each physician, or set of physicians, be considered a distinct unit, and that a waiver of the privilege as to one should not prevent its assertion to prevent the disclosure of confidential communications to another. The weight of authority is to this effect, and opposed to the principal case. *Pennsylvania Mutual Life Ins. Co. v. Wiles*, 100 Ind. 92; *Barker v. Cunard S. S. Co.*, 91 Hun 495, 36 N. Y. Supp. 256. The privilege in question has been severely criticised, and a logical application of it may sometimes work injustice. See WIGMORE, EVIDENCE, § 2380; 10 MEDICO-LEGAL JOURNAL, 33. But the remedy in such case lies with the legislature, not in an arbitrary destruction of the privilege by the courts. See *Renihan v. Demien*, 103 N. Y. 573, 580.

BOOK REVIEWS.

HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS. By Roger W. Cooley, LL.M. St. Paul: West Publishing Co. 1914. pp. xii, 711.

In this book Professor Cooley has gathered together and placed in readable form the ordinary things about municipal corporations. It is a good book, with the merits and some defects found in the books of its class: clear statement of elementary principles, full citation of cases, not much discussion and little attempt to develop fundamental principles or to criticise decisions. Nice discriminations are not to be expected, and contradictory statements are sometimes found; but frequent references to other treatises, and especially to Dillon's standard work, show that the author usually stands on safe ground.

An example of these qualities is Professor Cooley's treatment of the difference between governmental and other powers of a municipal corporation. The author, following the current practice, groups all powers as governmental and municipal; a grouping which either confuses the distinction between public and commercial municipal powers, or omits altogether the latter class. Among governmental powers, the power to extinguish fires is included (p. 137), apparently for no reason except that the city is not liable for a wrong done in the exercise of the power; while on the other hand, he is forced to class streets and sewers, along with public-service activities, among municipal powers. Parks he classes among municipal activities (p. 367), though it is pretty clear that a city is not liable for a defect in a park. He then (neglecting apparently all the cases where the city is not liable in tort) lays down the principle that the liability of a municipal corporation in tort is in most cases based upon the doctrine *respondet superior*. For this statement no authority is cited, and it seems clear that this doctrine, based on the principal's advantage from the agent's act in business agency, has no application to a principal who is executing a public trust.

For many purposes a handbook like this may be much more useful than an elaborate four- or five-volume work; and though some of the important topics are sketchily treated, the book is trustworthy as a whole.

J. H. B.

POLARIZED LAW: three lectures on Conflicts of Law delivered at the University of London, by T. Baty, D.C.L., LL.D. London: Stevens & Haynes, 1914. pp. xv, 210.

The principle upon which these lectures were constructed was, to pass briefly over the greater part of the subject, and to treat with thoroughness a few topics of special interest to the lecturer. Topics so treated are: nationality, marriage, divorce and marital property, and foreign theories of private international law. The discussion of these subjects is illuminated throughout by Dr. Baty's shrewdness, acuteness and felicity of statement. If, like a greater scholar, he permits himself the use of strange words to characterize familiar things we have learned to forgive and forget it.

The topic usually called in our law the Conflict of Laws is, he says, absolute rights viewed through the medium of a particular law — i.e., polarized. He correctly and forcibly argues that English rules "for the occasional application of foreign law instead of" English, as he defines the subject, is a branch of the law of England. His reasons for discarding, as regulator of personal relations, the national law of a person for the law of his domicile are well chosen and convincingly expressed. His criticism of the cases of *De Nicols v. Curlier* is refreshingly frank. The reviewer cannot agree, however, with his understanding of the law of marriage or of divorce. His statement that "divorce is a quasi-criminal process" hardly represents common-law authorities. His discussion of the unsatisfactory doctrine of the "*renvoi*" leaves little to be desired.

A very useful portion of the book is the Appendix, containing a translation of the Hague Private-Law Conventions. American lawyers cannot take them seriously, are rather amused when Weiss and other civilians rail at our refusal to join in them, and are unmoved when France withdraws her assent; but the conventions represent much time and thought on the part of the ablest European scholars, and one is glad to have them in a trustworthy English translation.

J. H. B.

SCINTILLAE JURIS (Sixth Edition) and MEDITATIONS IN THE TEA ROOM (Fourth Edition). By the Hon. Mr. Justice Darling, with a prefatory note by the Rt. Hon. Sir Edward Clark, K.C., London: Stevens and Haynes. 1914. pp. xii, 209.

The publishers have earned the gratitude of the younger generation of lawyers by bringing out a new edition of the *Scintillae*. Since 1877, when the first edition appeared anonymously, this little book has been a constant source of recreation and delight to the profession. Although written for the special edification of the English bar, when Brett, Bramwell and Kelly, whose judicial characteristics are satirized in the essay "Of Judges" were familiar figures on the bench, most of the *Scintillae* are still crisp and sparkling as ever. The passages on examination and cross-examination, witnesses and evidence, are fertile with suggestions for the young American advocate.

The *Meditations in the Tea Room*, which are combined with the *Scintillae* in this volume, are scarcely so familiar to American readers. For their benefit it should be noted that the seat of the "Meditations" is the tea room of the House of Commons, an atmosphere which gives the theme to the reflections. This book also was first published anonymously, and we are assured in a preface that it appeared some years before the author was elected to Parliament. The fact is a convincing bit of testimony to the closeness with which the secret of authorship was guarded, for the delicately pointed shafts which the young barrister directed against measures and ideas that were popular with the English electorate both in that day and this make the book, notwithstanding its merciless exposure of humbug, a daring tract to come from the pen of an aspirant to office. A flavor of cynicism running through the essays must have persuaded most readers that the work was what it purported to be: the mature reflections of a private member of long standing, with a keen eye and sharp tongue trained on the shams of democracy.

C. B.

THE DIVINE RIGHT OF KINGS. By John Neville Figgis. Second Edition. Cambridge: The University Press. 1914. pp. xi, 401.

Any extended reference to the second edition of this work which first appeared in 1896 is at this time unnecessary on account of the well-established position which it has already been accorded in the library of political philosophy. Little change has been made in the original text, although the author frankly concedes some historical shortcomings and confesses his conversion from the "Austinian idol." Three essays have, however, been added which in some measure expand the ideas of the original volume. These are "Aaron's Rod Blossoming or Jus Divinum in 1646," delivered as an address in the University of Leeds in 1913; "Erastus and Erastianism," which first appeared in the *Journal of Theological Studies* in 1900; and "Bartolus and the Development of European Political Ideas," reprinted from the *Transactions of the Royal Historical Society* of 1905. These, with the original appendices and a working index, complete a volume still justified, if for no other reason, by its effort to define and create a proper contemporary attitude of mind toward what we are too prone to dismiss as the more or less impossible theories of bygone days.

S. C. M.

A DIGEST OF THE LAW AND PRACTICE RELATING TO LOCAL GOVERNMENT IN ENGLAND AND WALES (including London). By Arthur D. Dean and E. J. Rimmer. London: Butterworth and Company. 1914. pp. xx, 303.

This work, in the words of the authors, is intended to provide a book "in every way suitable for students, officials and councillors alike." One's opinion

of it will accordingly depend to a considerable extent on what one considers in every way suitable for students, officials and councillors alike. The work is divided into five books. The first, being introductory, dismisses the question of the growth of local government and some discussion of the nature of local and central government in nine pages. Book II describes sixteen local authorities, their constitutions and function, in about fifty pages. Book III devotes seven pages to the government departments having jurisdiction in local government affairs. Book IV, which constitutes the bulk of the volume, deals in considerable detail with the legal powers and duties of local authorities under such divisions as administration, public health, education, insurance, finance, municipal works and undertakings, etc. Book V deals with the local government of London in about fifteen pages. The work is essentially a digest of the law relating to local government and the lay reader in search of a full description of local institutions would require some supplementary information. Tables of statutes and cases, together with a good index, have been incorporated.

S. C. M.

CODIFICATION IN BRITISH INDIA. By B. K. Acharyya. Calcutta: S. K. Banerji and Sons. 1914. pp. xxiii, 424.

THE CASE OF BELGIUM. By the Belgian Delegates to the United States. New York: The Macmillan Company. 1914. pp. xvii, 120.

FOREIGNERS IN TURKEY. THEIR JURIDICAL STATUS. By Philip M. Brown. Princeton: Princeton University Press. 1914. pp. vii, 157.

THE MINIMUM WAGE. By Rome G. Brown. Minneapolis: The Review Publishing Company. 1914. pp. xv, 98.

REPORT OF THE INTERNATIONAL COMMISSION ON THE BALKAN WARS. Issued by the Carnegie Endowment for International Peace. Washington, D. C.: Carnegie Endowment. 1914. pp. viii, 413.

CONCERNING JUSTICE. By Lucilius A. Emery. New Haven: Yale University Press. 1914. pp. 170.

WHERE THE PEOPLE RULE. By Gilbert L. Hedges. San Francisco: Bender-Moss Company. 1914. pp. vii, 214.

WORK AND WEALTH. By J. A. Hobson. New York: The Macmillan Company. 1914. pp. xvi, 367.

A DIGEST OF ENGLISH CIVIL LAW. Book III, Sections XII-XVII, Law of Property (concluded). By Edward Jenks. London: Butterworth and Company. 1914. pp. lviii, 979-1154, 23.

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MANUAL OF THE LAW OF EVIDENCE. By Sidney L. Phipson. Second Edition. London: Stephens and Haynes. 1914. pp. xxv, 211.

GOOD WILL, TRADE-MARKS AND UNFAIR TRADING. By Edward S. Rogers. New York: A. W. Shaw Company. 1914. pp. 288.

COMMENTARIES ON THE LAWS OF ENGLAND. Vols. I, II, III and IV. By Judge Serjeant Stephen. Sixteenth Edition. Winnipeg: Butterworth and Company. 1914. pp. ccxciv, 582, 42; xx, 866, 73; xviii, 709, 61; xiii, 455, 188.

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MUTUALITY AND CONSIDERATION

I

THE underlying principle of consideration would seem to be negative, — a denial that ordinarily there is sufficient reason why gratuitous promises should be enforced. From a nude pact no obligation arises. The courts have not felt impelled to extend a remedy to one who seeks to get something for nothing. English law accordingly will not usually enforce a promise unless it is given for value, or the promise of value, *i. e.*, something which the law must assume to be of some value to the promisor and which the parties make the subject of bargain or exchange.¹

Some classes of gratuitous promises, however, may properly be deemed binding as having other good grounds of enforcement than consideration in the sense of value received. Such are formal promises under seal. So promises of gifts which induce action in reliance thereon, although born naked into the world, may become swaddled after birth in what may be termed a *quasi-estoppel*.²

¹ 2 Pollock and Maitland, *History of English Law*, pp. 211, 212. In the early Roman law a gratuitous promise was only enforceable if made under all the solemnities of a formal contract. Girard, *Droit Romain*, p. 608. In modern German law a similar requirement exists, and an agreement by which a future gift is promised is invalid unless made by a public act. Schuster, *German Civil Law*, §§ 97, 200. Thus the underlying principles of other legal systems are more similar to our own than is usually admitted.

² Recognized by many courts, for example, where steps are taken and expenditures are incurred on the faith of a charitable subscription. 11 Mich. L. Rev. 425; 7 Com-

So promises based on moral obligations of a not too diaphanous sort are coming more and more to be regarded as having a decent vestment.³ Except in these classes of cases, however, the common law modestly declines to enforce a promise unless made by way of bargain in return for value present or future. The traditional theory (or superstition), with which I venture to differ, insists on a finding of present value actually received in bilateral as well as unilateral contracts. May we not more satisfactorily explain the consideration element of bilateral contracts as residing in mutuality or reciprocity of engagement, and the nature of the transaction as non-gratuitous? In other words, should we not frankly recognize that promises may be bought upon credit as well as for cash or value received?

In a recent article, supplementary to his noteworthy article of twenty years before, Professor Williston has surveyed anew the theory of consideration in bilateral contracts and has advanced a renovated definition of such consideration.⁴ Coming from so authoritative a source his carefully elaborated formula deserves, and will no doubt receive, wide attention.

The result of Professor Williston's argument, supported by a learned array of authorities, is "that no briefer definition of sufficient consideration in a bilateral contract can be given than this: *Mutual promises each of which assures some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another.*"

As a great admirer of Professor Williston, both personally and as a teacher and writer, I regret to find myself in disagreement with him in any particular. I am indeed in substantial agreement with him as to the authorities and the practical results. I feel

mercial Laws of the World, p. 81; *Brokaw v. McElroy*, 143 N. W. 1087 (Iowa, 1913); *Y. M. C. A. v. Estill*, 140 Ga. 291, 78 S. E. 1075 (1913); see note, 48 L. R. A. N. S. 783.

³ Recognized by some courts when based on moral obligation arising from unjust enrichment by the receipt of a material benefit, or arising from the infliction of a material loss, being an extension of the principles of quasi-contract, where a tangible moral duty is recognized by express promise. 7 Commercial Laws of the World, p. 85; note to *Muir v. Kane*, 26 L. R. A. N. S. 519, 532.

⁴ 27 HARV. L. REV. 503; cf. 8 HARV. L. REV. 27.

called upon, however, to dissent from his explanation and theory of those results, especially as he has inadvertently, in a passing reference to an article by me,⁵ stated in a somewhat misleading way my theory of the element of consideration in bilateral contracts, and by a knock-down argument demolished a man of straw.

As I view it, the doctrine of consideration is an attempt to generalize and reduce to a rule or formula that mutuality or reciprocity which must exist in an agreement to make it non-gratuitous and so worthy of enforcement. It is a test to distinguish gratuitous promises from those in which there is found mutuality of concession or benefit flowing to each party. Any degree of reciprocity will suffice to keep a pact from being nude or gratuitous. Wherein, then, is this reciprocity to be found in bilateral contracts? Professor Williston, in effect, insists upon *mutuality of obligation* as part of his test, although he objects vigorously to this terminology.⁶ The proposition is indeed usually stated as being absolutely axiomatic, that unless both parties are bound, neither will be bound; yet I make bold to deny that mutuality of obligation is an essential element of a contract or of consideration, and find the element of reciprocity in the *mutuality of engagement* or undertaking by each party, — regardless of the legal effect of the promise. This is more in line with Professor Williston's former mode of statement that the test is whether each side has promised something the performance of which will be or *may be* a detriment. It seems also more in accordance with the definitions quoted and relied on by him in his present article.⁷

To Professor Williston belongs the credit of having pointed out the question-begging fallacy in Langdell's theory. Langdell started with the premise that we must find in bilateral contracts a present detriment incurred on each side at the instant the con-

⁵ 27 HARV. L. REV. 504, note referring to 11 Mich. L. Rev. 423.

⁶ 27 HARV. L. REV. 525.

⁷ 8 HARV. L. REV. 27, 35. Leake on Contracts, 1 ed., p. 314; 2 ed., pp. 612, 613: "Whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration." So in the 6 ed., p. 435: "The consideration is the matter accepted or agreed upon as the equivalent for which the promise is made." So, according to Lord Blackburn, executory consideration exists "*if what the plaintiff has agreed to do is either for the benefit of the defendant or to the trouble or prejudice of the plaintiff.*" Bolton v. Madden, L. R. 9 Q. B. 55, 56 (1873). Currie v. Misa, L. R. 10 Exch. 153 (1875), cited 27 HARV. L. REV. 520, n. 41.

tract is made, applying the same test of consideration to bilateral contracts as to the older unilateral contracts. He argues that the consideration of a promise must always be strictly contemporaneous with the promise itself. In bilateral contracts the only thing contemporaneous with either promise is the counter promise. The promise is all that the promisor gets in exchange and all that the promisee parts with. Unless a promise is binding and imposes an obligation, it cannot be considered a detriment; and the reason that a promise is a sufficient consideration is that it is binding and so creates a detrimental obligation.⁸

Langdell thus argues that each promise in a bilateral contract imposes a detriment because it is an obligation, and it becomes an obligation because it imposes a detriment. This seems to be counting one's chickens before they are hatched, and to be relying on the results of a rule to furnish its cause.

Professor Williston admits that there is no logical justification for holding mutual promises good consideration for each other, if the value of such consideration must always be found in a present detriment, imposed at the instant the promise is made. He avoids the question-begging assumption of Langdell by admitting that the requirements of consideration in bilateral contracts do not include a present detriment incurred when the contract is made, such as must be found in a unilateral contract. The needless assumption of such a requirement is the source of the logical difficulties in the reasoning of Langdell, Pollock, and Ashley, and leads Sir Frederick Pollock to characterize the doctrine as "one of the secret paradoxes of the Common Law."⁹

According to Professor Williston (who in this agrees with Ames) it is the promises in fact which are exchanged, not the obligations resulting therefrom. The promise in fact is of sufficient potential value if it gives assurance of something of possible value, and is a promise that may become binding, *i. e.*, is not rendered void by

⁸ Langdell, Summary of Contracts, §§ 81, 84.

⁹ See Williston, 27 HARV. L. REV. 508, 518; see also article by the writer, 11 Mich. L. Rev. 430; 30 L. Quart. Rev. 129; Pollock, Contracts, 8 ed., p. 191: "In fact there is no conclusive reason other than the convenience of so holding, for the rule that promise and counter promise will make one another binding; for neither of them before it is known to be binding in law, is in itself any benefit to the promisee or burden to the promisor."

incapacity or any rule of law other than that relating to consideration. To put it in somewhat different terms: where the law operating on the promises can produce mutuality of obligation, it will so operate, otherwise it will not operate upon either; and therefore promises on which it can operate are of value. Professor Williston avoids the absurdity, into which the premises of Langdell and Pollock lead them (of holding that a *promise* to perform what one is already under contract with another to do, may be a more valuable consideration than actual performance itself), by adding the requirement that the thing promised as well as the promise be something of value. While he thus gives up present detriment as the test of consideration in bilateral contracts, and judges of its sufficiency by the character of the things promised, he nevertheless still adheres to the view that consideration necessarily involves some kind of present value received, and declines to think of consideration as being executory, *i. e.*, future value to be received. The promise in fact furnishes present potential value in exchange, because it will have actual value when it becomes binding. But what I conceive to be the mistaken starting point in this theory, as in that of present detriment, is the needless assumption that (in the words of Professor Williston) a promise has no consideration "wherever the thing in consideration for which the promise is offered was not actually given."

The *quid pro quo* of an action of debt must be something actually given or done. When the action of *assumpsit* was first introduced in the sixteenth century, the only consideration recognized was an executed consideration, value actually given or detriment incurred.¹⁰ To extend the action to bilateral contracts without appearance of change, it was said that "mutual promises are consideration for each other," and this became the language of pleading and of the courts. But the courts have never stopped to analyze what they meant by "promise." They simply meant that executory consideration was sufficient. It is therefore not necessary to take this loose and uncritical language of the judges and pleaders literally.

Professor Williston apparently attributes to me the position that consideration is to be found in the exchange of actual performances, and that it is the actual performances which are considera-

¹⁰ W. S. Holdsworth, 11 Mich. L. Rev. 347.

tion for each other.¹¹ What I have endeavored to show, however, is that the element of consideration or reciprocity must be found not in the actual performances nor in the promises but in the *promised performance*, i. e., in the nature, relation, and future value of the *contemplated* performances.

Like many legal mottoes and catch phrases, the easy and time-honored formula that promise is consideration for promise is but a legal "bromide," which is ordinarily used as a substitute for thought, to disguise a lack of analysis under vague and specious words. It is submitted that "*promise*" here means neither the expression of assent or agreement, the promise in fact; nor the obligation which results therefrom; nor the actual performance; but the promised performance, that is, the prospective value bargained for. Any mutual promises which contemplate the possibility of a required performance on each side constitute a contract, since they involve mutuality or reciprocity in the things promised. If a promise is made in view of a benefit to be received, and if something of possible value is promised in return, that is sufficient consideration. This interpretation of terms does not involve any serious upset in received legal terminology, and is in accordance with the practice of the courts, who according to Professor Williston in discussing the sufficiency of consideration have always "considered the character of the things promised."

It is doubtless true that "parties to a bilateral contract always contemplate that performance on one side is an exchange or price for performance on the other." This is the basis of implied conditions or the dependency of the duty of performance upon the counter performance, according to Professor Williston.¹² But I do not find that reciprocity which furnishes the consideration or source of obligation in the actual performance (which may never occur), but in the *promised* performances, the reciprocity of undertakings in the terms of the bargain.

Take the case put by Professor Williston as not being covered by my theory: "If A. promises B. to guarantee a debt of \$100 due to B. from X. in return for B.'s promise to A. to guarantee

¹¹ 27 HARV. L. REV. 504, n., commenting on my article in 11 Mich. L. Rev. 432. A similar misinterpretation was also fallen into by Dean Ashley in his article in 26 HARV. L. REV. 429.

¹² Wald's Pollock on Contracts, pp. 323, 324, n. 8.

payment of \$500 due A. from Y., the performances are in no sense in exchange for one another, or the consideration of one another, and yet there is a contract.

"Matters may so turn out that either party alone may be called upon to perform, or that both parties, or neither party, may have to pay. The promises are exchanged, though the performances are not expected to be; and even though the chance falls out that both parties have to pay, their payments are not in exchange for one another. They never proposed to exchange \$100.00 for \$500.00. The facts supposed are suggested by *Christie v. Borelly*, 29 L. J. C. P. N. S. 153 (1860)." ¹³

This is all quite true, but I do not see that it militates against the theory of consideration proposed. The reason the law regards the agreement as binding is that it is a non-gratuitous transaction involving some degree of reciprocity or mutuality from the standpoint of the parties, not because there is an exchange of present values. I submit that the assumption of a requirement of present value received in bilateral contracts is as unnecessary to the theory of consideration as Professor Williston himself concedes Langdell's assumption of a present detriment to be. From what is this premise derived but from the discarded analogy of unilateral contracts?

Take the simple case of a bet which illustrates the situation in all aleatory or risk contracts. A. bets ten dollars Yale will win; B. bets ten dollars Harvard will win. Under no possibility here can there be an exchange of performances; but is it a case of benevolence, of gratuity, on either side? No, the mutuality or reciprocity is obvious. Why? Because of an exchange of values in promises or obligations? No. It is because the bargain contemplates possible performance on either side, and because each side stands a chance to win. That is why it is not a one-sided gratuity, a case of "heads I win, tails you lose." Performance is not to be given in exchange for performance, but the possibility of performance on one side is undertaken in exchange for the possibility of performance by the other side. Neither promise is gratuitous, although neither promise is given for value received, but on credit for the chance of value to be received.

To paraphrase the argument of Professor Williston in speaking

¹³ 27 HARV. L. REV. 504, n.

of conditional promises, and to apply it to the things promised, — it is not necessary in order that a thing promised furnish reciprocity, that it will certainly prove detrimental to the promisor or beneficial to the promisee. The possible or speculative value of a contingent performance is a sufficient consideration. The condition upon which performance is to take place may not happen, but the possibility that the condition may take place involves a chance of benefit, which is sufficient to furnish reciprocity, and make the thing promised valuable consideration. The reciprocity is as real where the contingency has already happened, and is unknown, — for example, insurance of a ship lost at sea, — as it is in the case of a risk on a future event. Where the bargain, so far as known, may turn out to be beneficial to either party, there is mutuality. The value legally sufficient to support a promise may be a present one or a future one, a certain one or a contingent one, provided that the contingency is independent of the choice of the promisor, according to the terms of the undertaking.

The theory that an executory consideration is some kind of value received, and that a binding promise is the *quid pro quo* or value given for a promise, logically requires that there should be absolute mutuality of obligation, so that each party will have an action to enforce the counter promise. As a federal court puts the theory: "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising. It must bind the promisor, *so that the promisee may maintain an action for its breach*, or it is without legal effect and void." ¹⁴

Professor Williston accordingly lays it down in his more recent article, that a promise is of no value unless it both gives assurance of the performance of something of possible value, and unless it will also be binding. A promise which is *void* is therefore insufficient consideration. Professor Williston candidly admits, however, that "contracts, where one promise is *voidable* or unenforceable, present some difficulty with regard to the law of consideration." ¹⁵ Should one not say rather with regard to this *theory* of the law of consideration, which seems to break down in these crucial

¹⁴ Cold Blast Transp. Co. v. Kansas City, B. & N. Co., 114 Fed. 77 (1902).

¹⁵ 27 HARV. L. REV. 507.

cases? It is usually said that a voidable promise of an infant, for example, is regarded by the law as something of value.¹⁶ But as Professor Williston admits, "The promise of an infant, an insane person, or one whose promise is performable only at his option, is not a thing of such value, whatever may be the nature of the thing promised, that the law would ordinarily regard such a promise as sufficient consideration."¹⁷ A promise to perform "if I choose," or "if I conclude to ratify," or "unless I avoid or cancel," would be insufficient as lacking mutuality.¹⁸

Many instances of unenforceable promises which, however, do not invalidate contracts might be given. Although a plaintiff may not be liable to an action on a contract because of the Statute of Frauds, that does not destroy the consideration, or let off the party who has signed the memorandum.¹⁹ There are one or two decisions the other way, but they are against the overwhelming weight of authority.²⁰ Similarly there is no difficulty about consideration although the contract is entirely unenforceable *ab initio* by one of the parties on account of insanity, drunkenness, fraud, or illegality. In all these cases and others it may be binding on one party and not on the other.²¹ Would these cases not suggest that there is a distinction somewhere between lack of consideration and lack of mutuality of obligation, and that lack of mutuality in the legal effect of promises is immaterial?

Apparently the greatest, if not the only, function of the orthodox doctrine that only a binding promise is valuable consideration, is to explain why the bilateral contract of a person *sui juris* with a married woman is entirely void, *i. e.*, not enforceable even against him. The whole justification of the literal interpretation of the formula that a promise is consideration for a promise, is therefore in effect placed on the shoulders of married women. But is the voidable promise of an infant of more value to the adult party than the void promise of a married woman? The infant's promise is not merely of zero value, it has a minus value. It is not an asset,

¹⁶ Williston, Sales, § 12.

¹⁷ 27 HARV. L. REV. 528.

¹⁸ Rehm-Zeiber Co. v. F. G. Walker Co., 156 Ky. 6, 160 S. W. 777 (1913).

¹⁹ Justice v. Lang, 42 N. Y. 493, 521 (1870).

²⁰ Houser v. Hobart, 22 Idaho 735, 127 Pac. 997, 43 L. R. A. N. S. 410, n. (1912).

²¹ San Francisco Credit Clearing House v. MacDonald, 18 Cal. App. 212, 122 Pac.

but a liability, as the adult is bound and the infant is not until he ratifies. According to some courts, at least, if a married woman contracts to buy on credit and executes a note for the purchase price, she may or may not proceed with the contract she has made as she may elect, and the person contracting with her cannot refuse to carry out the agreement if she is willing, merely because she is a married woman.²²

Would it not be better, therefore, to explain the married woman cases simply as being very logical deductions by some courts from a mistaken premise that want of mutuality of obligation is a defense to a contract? Admitting that the married woman could sue the other party after performance or if she furnishes other consideration than a promise,²³ this single instance is scarcely sufficient to form the corner stone of the entire theory of executory consideration, and to afford the premise from which it purports to be deduced. It might have been fair and just for the law to add to the consideration requirement a rule calling for mutuality of legal obligation in all bilateral contracts. Yet in spite of language used by courts and text writers to this effect such has not been the policy adopted by the common law save in one or two sporadic instances. "Illusory promises," though usually explained in terms of mutuality of obligation, can only be harmonized with the voidable-contract cases by discriminating lack of reciprocity of undertaking from lack of mutuality of legal obligation. *Ultra vires* contracts are sometimes mentioned in this connection, but these contracts are to be explained as being void rather on grounds of public policy²⁴ than for lack of consideration. The treatment of *ultra vires* contracts would seem to be anomalous, confused, and exceptional, and to furnish small material for argument as to other topics.

Professor Williston is forced by his theory to brush aside all the cases of voidable contracts as anomalous and hopeless exceptions

²² *Pitts v. Elser*, 87 Tex. 347, 28 S. W. 518 (1894); see also *Frazier v. Lambert*, 115 S. W. 1174 (Tex. Civ. App., 1909); *Mansley v. Smith*, 6 Phila. 223 (1867); *Dickson v. Kempinsky*, 96 Mo. 252, 9 S. W. 618 (1888).

²³ *Chamberlin v. Robertson*, 31 Ia. 408 (1871); *Dickson v. Kempinsky*, 96 Mo. 252, 258, 9 S. W. 618 (1888); *McQuitty v. The Continental Life Ins. Co.*, 15 R. I. 573, 578, 10 Atl. 635 (1887); *Tuttle v. Rembert*, 2 Strob. (S. C.) 270 (1847); *Jackson v. Rutledge*, 3 Lea (Tenn.) 626, 632 (1879).

²⁴ *Copper Miners v. Fox*, 16 Q. B. 229, 237 (1851), cited by Ames, 13 HARV. L. REV. 34.

to his rule of consideration, since they lack mutuality of obligation. But if all these cases may be satisfactorily reconciled and explained on a simple and reasonable theory of consideration, it seems better to seek an underlying principle which is an almost universal solvent, rather than to ascribe these results to common error, or deal with them as exceptions unjustifiable on principle, merely to lay down a rule to fit the language of the courts and some married woman cases.

A theory of consideration is after all only a generalization of the cases and of the policy of the law, and if a given hypothesis won't work, and won't explain close cases, and if it goes lame when the shoe begins to pinch, then we should modify our theory and even our habitual terminology to fit the facts.

The lack of mutuality referred to so frequently by the courts which results in lack of consideration would not seem to be truly based on the alleged rule that both promises must be binding in law or neither is binding. It is not mutuality of obligation or remedy, but mutuality of engagement, which is actually required. The promises must be obligatory only in the sense of being obligatory according to their terms. A distinction must therefore be made between cases where by the terms of the bargain the plaintiff does not make any reciprocal undertaking and promises nothing definite or certain in return, and cases where lack of mutuality and obligation is due to some fact outside of the content of the bargain, such as incapacity, Statute of Frauds, illegality, duress, fraud, or other negative element. These two classes of cases seem to be entirely distinguishable in principle. In the first, we have an entirely one-sided proposition, — what is sometimes unfortunately referred to by the courts as a "unilateral contract." In the second, we have all of the affirmative elements of a valid contract, but the obligation of one of the parties is affected or taken away owing to the presence of some defense or negative element which does not affect the obligation of the other.²⁵ These cases of voidable promises can therefore be satisfactorily explained only on the theory here advanced, viz., that there is ample consideration at present in the reciprocity or mutuality of the respective undertakings, although one of the parties to the contract may have an absolute personal

²⁵ Compare Page on Contracts, § 303.

defense. A promise by a minor, therefore, furnishes consideration, not because there is any value in a voidable promise, but because there is reciprocity in the terms of the bargain. Here the law gives the infant the personal privilege of receding from it at his pleasure. If, however, a would-be seller should make a proposition to deliver such quantity of any commodity as an infant buyer might choose to order, and the infant accepted it but did not agree to order any definite quantity, or reserved expressly a right to cancel his order, such a contract would doubtless be held lacking in mutuality and void *in toto*. There is therefore no exception to the ordinary requirements of mutuality in the case of an infant's contract. The disability of the infant, whereby he is exempted from the obligation of his contracts, is not created by the law for the benefit of those who contract with him, but for his own protection.

It would seem to be a sound principle of law which demands some mutuality or reciprocity of engagement as the basis of a contract and which refuses recognition to an entirely one-sided proposition in which one of the parties promises nothing definite in return.²⁶ From this it will usually follow that one party will not be able to go into court to enforce a contract unless the other can. But this is not what the requirement really means, although the loose language of the courts usually puts the symptom for the cause. The distinction between an option to perform given by the terms of the contract and an absolute defense given by the law is a substantial one, as in the former case the elements of a contract were never present, while they are in the latter, and the law gives a defense to one party only on grounds of justice or policy toward him.

I would accordingly venture to propose a modified version of Professor Williston's definition to read as follows: Consideration is something of possible value given or *undertaken to be given* in return for something promised.²⁷ A bilateral contract is based on sufficient consideration which by its terms is a bargain involving any appreciable degree of mutuality or reciprocity in the things promised on each side. The test of this is whether the performance promised will be or apparently may be legally detrimental to the promisor or legally beneficial to the promisee. There is consideration even though the promises on one side may be unenforceable

²⁶ Williston, Sales, pp. 203, 798, 800.

²⁷ See Currie v. Misa, *supra*.

by reason of some negative element in the contract which excuses one of the parties from liability thereon. The test of the consideration is the possible value of the thing promised and not the effect of the promise itself.

Under the lead of Langdell there has been a tendency to take detriment as the universal test of the sufficiency of consideration, and to say that the detriment alternative had swallowed up the benefit alternative of the usual definitions.²⁸ It would seem, however, that the essence of the idea of consideration is reciprocity in the possible benefit or value to the promisor of the thing promised in return, rather than the detriment or burden to the promisee. The incurring of detriment on the faith of the promise is indeed the true basis of the subscription paper and other *quasi-estoppel* cases, but not of wholly executory contracts. Consideration need not move from the promisee directly to the promisor, or be in fact beneficial to him, in order to furnish a sufficient basis to make the promise binding.²⁹ For one cannot say that what he has bargained for is not of value to him unless it conclusively appears so on its face or from its own intrinsic nature, as where it is something to which he is already entitled.

I do not propose to attempt a discussion of the desirability of the legal benefit-detriment test of the sufficiency of consideration adopted by Professor Williston as compared with the Ames theory. Professor Ames contended that the attempt to formulate a technical test to measure the sufficiency in value of what is promised or given as consideration in bargains has not proved a success. He pointed out that this attempt has encumbered the law with unreasonable distinctions and subtleties which serve no useful purpose.³⁰ Professor Ames argued that the detriment test functions properly only in cases which could better be put on other grounds, and that where the basis of a bargain was vicious, as abstaining from a crime, a tort, a breach of contract or legal duty, or the taking of unfair advantage of the necessities of the other party, there the contract should be held invalid as being illegal or

²⁸ Langdell, Summary of Contracts, § 64.

²⁹ *Drovers', etc. Bank v. Tichenor*, 156 Wis. 251, 145 N. W. 777 (1914).

³⁰ 12 HARV. L. REV. 530; 13 HARV. L. REV. 29; see also *Melroy v. Kemmerer*, 218 Pa. 381, 67 Atl. 699 (1907); *Ex parte Ziegler*, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. N. S. 1005, n. (1909).

contrary to public policy rather than as lacking in consideration, which he found in the exchange of all promises in fact.

Whether the attempt has proved wise or not to measure the sufficiency of consideration by a technical and mechanical formula, there can be no doubt, as Professor Williston shows, that this represents the settled policy of the law. If we recognize gain or benefit to the promisee, we can uphold the view of the English courts and of a minority of American courts that the completion of contracts with a third party (or the promise thereof) is valid consideration for a promise.³¹ This would meet some of the strongest instances put by Dean Ames where the test of legal detriment leads to unsatisfactory results.

What, then, in conclusion, is the basic reason why the law in general finds a ground for the enforcement of executory two-sided bargains and not of one-sided or gratuitous promises? I believe the answer is a broad but simple one. Without some positive sanction or legal guarantee that reciprocal bargains are binding, men would be unable to do business or make reliable arrangements for the future. Good faith and honesty demand that men be entitled to rely on their bargains, and that they stand by them if they are reciprocal. Mutuality or reciprocity characterizes all fair business transactions. It is not in the mutual expression of assent, nor in the legal effect of the promises however that reciprocity is sought, but in the content of the bargain, the possible value to be received on either side.

Is not the literal interpretation of promise for promise as *quid pro quo* (*i. e.*, present value actually received on each side in the making of the contract), like the supposed incurring of a present detriment, merely a factitious attempt to assimilate executory consideration to executed consideration? There must, of course, be mutuality of assent. But is not the actual value bargained for a future value? If we formulate the real policy which dictates the consideration requirement, and on which the cases are decided, instead of taking too seriously the pseudo-scientific language of the courts, we may at last put the theory of executory consideration on a logical, consistent, and intelligible basis.

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³¹ *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197 (1895).

BUSINESS JURISPRUDENCE

THE law of railroads, shipping, banking, corporations, partnership, brokerage, trade marks, "unfair competition," "restraint of trade," "monopoly," and related subjects has been much discussed, but little attention has been devoted in this country to a study of the thing of which all these particular subjects are commonly but phases, — the doing of business. The most perplexing legal problems of the present time are concerned with business, and a clear conception of how the doing of business differs, if at all, from the other activities of life, as well as of its legal characteristics, becomes important. The laws applicable to business properly form a distinct branch of jurisprudence, and are so recognized in practically all countries except those in which the common law prevails. Most of the nations of Europe¹ and of Latin America, as well as Japan, have formulated codes of commerce, not perfect by any means,² and approaching the subject from different angles, but indicative at least, from their very existence, of a consciousness on the part of courts, lawyers, and business men that there is a difference, naturally and legally, between business on the one hand and the other activities and interests of life on the other; so much so as to require distinct treatment in the interest both of the public and of trade.³

In the nature of things, different rules are applicable to business than to the more formal, fixed, and personal relations of society, such as estates in land, succession, and domestic relations.

"The affairs of commerce," says Montesquieu,⁴ "are but little susceptible of formalities. They are the actions of a day, and are every

¹ Lyon-Caen and Renault, *Droit Commercial*, vol. 1, p. 46.

² The French code, for example, is said to have "had its day," — "a fait son temps." Introduction to French Commercial Code, *Commercial Laws of the World*, vol. XXI, p. 6.

³ ". . . I have long entertained the belief" said Mr. Justice Story, deploring the indifference of English lawyers to the study of foreign jurisprudence, "that an enlarged acquaintance with the Continental Jurisprudence, and especially with that of France, would furnish the most solid means of improvement of Commercial Law, as it now is, or hereafter may be, administered in America." *Commentaries on the Law of Bailments* (1856), — Preface.

⁴ *Esprit des Lois*, bk. 20, ch. 18.

day followed by others of the same nature. Hence it becomes necessary that every day they should be decided. It is otherwise with those actions of life which have a principal influence on futurity, but rarely happen. We seldom marry more than once; deeds and wills are not the work of every day; we are but once of age."

Trade is characterized, moreover, by a certain cosmopolitanism which should be reflected in the laws which relate to it. As observed by the same philosopher:⁵

"Riches consist either in lands or in movable effects. The soil of every country is commonly possessed by the natives. The laws of most states render foreigners unwilling to purchase these lands; and nothing but the presence of the owner improves them: this kind of riches, therefore, belongs to every state in particular; but movable effects, as money, notes, bills of exchange, stocks in companies, vessels, and, in fine, all merchandise, belong to the whole world in general; in this respect, it is composed of but one single state of which all the societies of the earth are members."

Nations have traded with one another from the earliest ages, and a *jus gentium*, a law merchant or business law, was developed and observed at a remote period notwithstanding the fact that foreigners as such were then universally regarded as natural enemies and legitimate objects of spoliation.⁶

It may, therefore, be thought a matter of surprise that the English, "who," observes the writer already quoted, "know better than any other people on earth how to value those three great advantages, — religion, commerce, and liberty," should have so completely neglected this branch of jurisprudence. At the present time it cannot be said that the common law looks upon business as a distinct phenomenon, or that its administration is characterized by that appreciation of the needs of business and of the merchant class that prevails elsewhere. The leading cases, notably those dealing with the law of combination and conspiracy, do not ordinarily differentiate business activities from others not of that character. Prior to the founding of the American colonies, there is scarcely a business decision to be found in the reports, and today

⁵ *Esprit des Lois*, bk. 20, ch. 23.

⁶ Boeckh, *Public Economy of the Athenians*, bk. 1, ch. 9; bk. 2, ch. 11. Maine, *Ancient Law*, ch. 3. *Borough Customs* (Selden Society), vol. 2, introd., p. xviii.

the term "Commercial Law" suggests to us merely the law of negotiable instruments, just as it did to Mr. Justice Cranch more than one hundred years ago, when he was struck by this absence of early precedent and attempted to explain it.⁷ But I shall point out that this condition of our law has come about through accidental circumstances rather than as the result of natural development. After indicating some of the confusion which has resulted from the failure to deal with business as business, particularly in the field of business' regulation, I shall attempt to show, as the main purpose of this paper, that the common law has, in truth, a real potentiality on its business side, which, when fully appreciated and made use of, may be of great service in dealing with business problems at the present time.

The almost total absence of business decisions in the Year Books and for generations afterward loses much of its force as a reflection upon the common law when we understand the reasons for this absence, realize the early activity of the common law on its business side, and note the vigor and intelligence which characterized its administration in the period subsequent to the Norman invasion and prior to the Hundred Years War and Black Death. During this interval, as natural under the social and economic conditions then prevailing, business was carried on at stated periods in fairs and

⁷ *Dunlop v. Silver*, Appendix, 1 Cranch (U. S.) 367, 374 (1801). ". . . Before the time of James I., we have scarcely a mercantile case in the books; and yet long before that time, the laws respecting real estates and the criminal code were nearly as well understood as they are at this day. Hence it cannot be a matter of great surprise, that the principles of commercial law which have been developed by the exigencies of modern times, should have been, by some, considered as exceptions from the general principles of the common law. The truth seems to be, that the principles of the common law have not been changed, nor innovated upon, by the introduction of those commercial principles, but that these principles have existed from the earliest times, even from the rudest state of commerce, and the only reason why we do not find them in the ancient books, is, that the circumstances had never occurred which rendered it necessary to draw them forth into judicial decision.

"Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms; and although it is right that established forms should be respected, yet it must be acknowledged that they have in some measure obstructed that gradual amelioration of the jurisprudence of the country which the progressive improvement of the state of civil society demanded. . . ."

definite market areas, an arrangement admitting of close supervision and accomplishing at the same time many of the results of modern advertising. Forestalling, regrating, and engrossing were prohibited in the interest of fair trade and equal opportunity.⁸ To every fair a court of Piepowder was appurtenant.⁹ This court, which Blackstone says "was the lowest and at the same time the most expeditious court of justice known to the law of England,"¹⁰ but which in his time was already a matter of history, was a court of record, in which the law merchant was administered by the steward of the fair with the assistance of the merchants,¹¹ and which originally and for a long time had jurisdiction of all matters taking place in the time of the fair, without limitation as to amount, civil as well as criminal,¹² and between denizens as well as foreigners. In the zenith of its power it "was one of the most active and most widespread of all the tribunals formerly existing in England, and formed a separate organic unit in the judicial system of the realm."¹³ "As attachments were then returnable and pleas might be adjourned from hour to hour, either there was a continuous session daily from eight or nine A.M., until sunset if necessary, or there might be one session in the morning and one in the afternoon."¹⁴

Similarly there were also Staple courts attached to certain towns through which the foreign trade in wool, leather, and other standard commodities was carried on, likewise having general

⁸ Stat. 7 & 8 Vict. (1844) purported to "abolish" these offenses. But it is a mistake to suppose that they are obsolete. They were offenses against the market, and it is the extent of the latter and the forms of business that have changed.

⁹ Coke Inst., pt. 4, ch. 60.

¹⁰ Commentaries, bk. 3, ch. 4, p. 32.

¹¹ Coke Inst., Blackstone's Commentaries, *supra*. See Select Cases on the Law Merchant (Selden Society) for many instances of declaration of the law by, and other activity on the part of, merchants at the Fair Court of St. Ives. The following summons issued from this court in 1275, and printed in Select Pleas in Manorial Courts (Selden Society), vol. 1, p. 153, is illustrative: "Let all the merchants of all the commonalties that are in the fair of S. Ives be summoned to come tomorrow before the steward to adjudge and provide that Thomas de Toraux, Ralph Balancer, Robert Pole, and John son of Thomas at Gate, merchants selling canvas, have justice and equity (*justiciam et equitatem*) in the matter of Simon Blake of Bury servant of the said Thomas and his fellows who was found in their booth measuring canvas with a false ell and selling it. Pledge for Thomas's appearance, all his goods. Pledge for the other three, Sir Richard Melbourne to the amount of £20."

¹² See generally Introduction to Select Cases on the Law Merchant, *supra*.

¹³ Select Cases, *supra*, introd., p. xiv.

¹⁴ *Ibid.*, p. xxiii.

civil and criminal jurisdiction and administering the law merchant. The court had jurisdiction of all manner of contracts and covenants between merchant and merchant or other, whether the contract was made within the staple or without.¹⁵ A statute passed in the time of Edward the Third¹⁶ in effect codified the law of the Staple towns, and defined the authority and jurisdiction of the court with particularity, but the court itself was far more ancient.¹⁷ None of the King's officers was allowed cognizance of things belonging to the staple nor were his officers allowed to meddle therein. It was enacted "because that merchants cannot often long tarry in one place in hindrance of their business, we will and grant, that speedy right be to them done from day to day and from hour to hour."

There were business decisions, therefore, doubtless in abundance, but they never found their way into the Year Books or early reports as we know them, these being confined to cases arising in the King's courts as distinguished from those involving the law merchant.¹⁸

This law merchant was the business law of the world, — not merely the law of bills and notes as we think of it today. Its scope may be gathered from Malynes' *Lex Mercatoria*, published in England in 1622, which dealt with such subjects as suretyship and merchants' promises, bills of exchange, letters of credit, banks

¹⁵ Coke Inst., pt. 4, ch. 46.

¹⁶ 27 Ed. III., Stat. 2 (1353).

¹⁷ Coke Inst., pt. 4, ch. 46.

¹⁸ Zouch, Jurisdiction of the Admiralty of England (A. D. 1663): ". . . The Law Merchant is likewise mentioned and allowed by Sir Edward Coke, in his comment upon Littleton, as a law distinct from the common law of England. And so doth Mr. Selden mention it in his notes upon Fortescue. And Sir John Davis more fully owns it in a manuscript-tract touching impositions; where he affirms, 'That both the common law and the statute laws of England take notice of the Law Merchant, and do leave the causes of merchants to be decided by the rules of that law; which Law Merchant, he saith, as it is part of the law of nature and nations, is universal and one and the same in all countries of the world.' . . . He saith further, 'That until he understood the difference betwixt the Law Merchant and the common law of England, he did not a little marvel that England, entertaining traffick with all nations of the world, having so many ports, and so much good shipping, the King of England also being Lord of the Sea, what should be the cause that, in the books of the common law of England, there are to be found so few cases concerning merchants or ships: But now the reason thereof was apparent, for that the common law of the land did leave those cases to be ruled by another law; namely, the Law Merchant; which is a branch of the law of nations.'"

and bankers, factors and servants, freighting of ships, charter parties and bills of lading, policies of assurance, contribution or average, shipwreck, partners, bankruptcy, shipping and navigation, and merchants' oppignorations.

No attempt will be made to trace in detail the influences that combined to impair the vitality of the common law on its commercial side and bring it into the condition in which Lord Mansfield found it. By the time that society had recovered from the direct effects of the disasters referred to, the period of discovery had dawned and the main commercial interests of England gradually ceased to be internal.

"The increase of wealth, bringing a permanent and continuous local demand for commodities, together with the improvement of transport facilities and means of communication, due largely to the creation or repair of roads in the eighteenth century, diminished the importance of fairs and periodical markets, and tended to sap the vitality of the old tribunals of justice or rendered many of them wholly obsolete."¹⁹

Thus weakened, the triumph of the King's courts, always jealous of their commercial rivals, was not long to be postponed, and the administration of business law fell into the hands of judges having no training for or sympathy with the task.²⁰

From this review it may be fairly concluded that the present condition of our law is the result of peculiar circumstances rather than of a natural development, and that under a true expression of the spirit of the common law, business would today occupy a distinct place in English law, just as it has continued to do under foreign systems. The failure to make the necessary differentiation has introduced confusion into a department of our law in which above all others clearness is important, and this confusion is conspicuous in the field of regulation.

The courts administering the common law, instead of treating business as business, have divided it into two classes, public and private. The classification pervades all the books, all the statutes, and all discussions. Most of the American states have their public service or public utility commissions dealing for the greater part with and within the class of corporations enjoying franchises or

¹⁹ Select Cases, *supra*, introd., p. xix.

²⁰ Jenks, A Short History of English Law, pp. 40, 75.

exercising the right of eminent domain. A "public service or *quasi* public corporation" has been defined by a late Massachusetts case as "one private in its ownership but having an appropriate franchise from the state to provide for a necessity or convenience of the general public incapable of being furnished through the ordinary channels of private competitive business and dependent for its exercise upon eminent domain or some agency of the government."²¹

New York has recently passed an act for the control of "private" bankers, by which is meant those bankers doing business without being incorporated. The English Companies Act of 1908 provides for "private companies," such a company being defined as one "which by its articles restricts the right to transfer its shares, limits the number of its members, and prohibits any invitation to the public to subscribe for any shares or debentures of the company."

The doctrine uniformly accepted by our courts as well as by students of the common law today has been succinctly stated as follows:

"The distinction between the private callings — the rule — and the public callings — the exception — is the most consequential division in the law governing our business relations. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. . . . All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. . . ." ²²

But whether viewed as a classification of business for the purpose of measuring the duty of the trader as trader to public, or as furnishing a guide for the assertion of the police power of the state, this division has not been helpful in practice, and it is, I think, theoretically unsound, and the result of a misconstruction

²¹ Attorney General *v.* Haverhill Gas Light Co., 215 Mass. 394, 101 N. E. 1061 (1913).

²² Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 HARV. L. REV. 156.

of the cases upon which it purports to rest as well as of the overlooking of material evidence. The difficulty into which it leads in the field of regulation is aptly illustrated by two recent cases, one involving monopoly but no business, and the other business but no monopoly.

The first case, *Prairie Oil & Gas Co. v. United States*,²³ arose under the amendment to the Interstate Commerce Act²⁴ declaring that pipe lines should "be considered and held to be common carriers within the meaning and purpose" of that act. The company carried only its own oil, and the other facts are stated as follows:

"None of the petitioning corporations is organized or derives any of its corporate powers from laws of the state of its creation under which common carrier or other public service corporations are organized, but each of them was formed and has always conducted its operations under and in compliance with state laws which relate to private as distinguished from public business. With certain alleged exceptions, which will be hereafter noticed, it is not claimed that either of the petitioners is under any statutory or legal obligation, other than the amendment in question, to perform the duties or otherwise act in the capacity of a common carrier. None of the petitioners possesses the right of eminent domain or has acquired any part of its property or rights of way by condemnation; nor has either of them received a franchise from any state, municipal, or local government, though each of them has in many instances laid its pipe lines across or along public streets and highways by permission or consent of the local authorities. None of them has ever held itself out as a common carrier or in fact carried oil for others, but each of them has carried only such oil as it produced from its own wells or purchased from other producers, and which it owned when the transportation took place. The pipe lines of petitioners are laid on private rights of way secured by purchase or lease, except that some of them for short distances, and one of them for a distance of some 300 miles, are laid upon and along the rights of way of certain railroads under some contract arrangement with such railroads."

These facts clearly did not bring the case within *Munn v. Illinois*,²⁵ as the court had little difficulty in demonstrating.

²³ 204 Fed. 798, 803, 810 (Commerce Court, 1913).

²⁴ 24 STAT. AT L. 379 (1887), ch. 104, as amended by 34 STAT. AT L. 584 (1906), ch. 3591.

²⁵ 94 U. S. 113 (1876).

The court says, however:

"It is not necessary in these cases to consider the circumstances under which or the extent to which business activities, whether public or private, may be regulated by public authority. That is not the point in dispute. That the business of these petitioners, as it is and has been carried on, may be subjected to regulation need not be in any wise questioned. But it is one thing to exercise public control of a private business which *as such* should be placed under public supervision; it is quite another thing to require that business to be changed from private to public and compel those who are engaged in it to assume the responsibilities of a public calling."

In other words, the business here consisted in buying oil, not in carrying it, but it was the latter that the statute assumed to regulate. The court was at a loss to see how this could be done in the absence of a public profession of carriage. When the case reached the Supreme Court, however,²⁶ Mr. Justice Holmes made a quick disposition of the difficulties. After premising that the transportation, though of oil belonging to the owner of the pipe line, was commerce within the meaning of the Constitution, he said:

"The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form."

The notion of an inseparable connection between the public character of the calling and regulation is plain, and to satisfy the requirement it became necessary to convert into a common carrier an activity which was not of that character under any accepted definition of the term.

The second case, *German Alliance Ins. Co. v. Kansas*,²⁷ involved the power of the state to regulate insurance rates. Monopoly as such was not involved.

"The business of fire insurance," it was claimed, "is private, with which the State has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly either legally or actually; it may not be legally conducted by the National Government or by the State of

²⁶ The Pipe Line Cases, 234 U. S. 548 (June 22, 1914).

²⁷ 233 U. S. 389, 397, 406, 428 (1914).

Kansas, or other States under their respective constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the State of Kansas, or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

Mr. Justice McKenna, delivering the opinion of the court, said:

"... We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied'; or, as we have said, quoting counsel, 'Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It

is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank v. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated. . . .”

It is plain that the court regarded the business as private, but subject nevertheless to regulation.

Mr. Justice Lamar, dissenting, with whom the Chief Justice and Mr. Justice Van Devanter concurred, said:

“ . . . The fundamental idea of a public business, as well declared by the Supreme Court of Kansas, 77 Kans. 608, is that ‘all of the public has a right to demand and share in’ it. That means that each member of the public on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex vi termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been convicted of arson. But if an insurance company is indeed public it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity, or known to be careless in their handling of property, the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal, where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public and not within the provision of the Constitution which only authorizes the taking of property for public purposes — whether the taking be of the fee for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate-regulation, which is but another method of exercising the same power.”

The majority escaped the difficulty of defining the word "public" with the observation that they could "best explain by examples," followed by a list of particular businesses commonly spoken of as public. The whole difference between the two branches of the court is to be explained by the fact that one looks wholly at the supposed public or private nature of the business, and the other at the power of governmental regulation, these things being assumed to have some necessary interrelation. The case is but an instance of the vicious circle which permeates the reasoning of most of the decisions dealing with business regulation. You may regulate a business if it is public, and it is public if it may be regulated. Or, it is public "if all the public have a right to demand and share in it," and if the public have not this right it is not public.

The fundamental difficulty lies in the conception that business is of two classes, public and private, and that the latter is subject to no duties to the individual and none to the state. This conception was developed and has been perpetuated largely through the law of common carriers. "Common" in this connection was assumed to mean "public," — public in the sense of "subject to control by the state." It was recognized that originally there were other "common" employments, but it was stated that they also were under peculiar public duties and this was explained on the basis of some *exceptional* relation to the public. It has been said:

"From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a 'common' or public occupation; and for a similar reason public officers were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers. Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business."²⁸

But no evidence of such *exceptional* relation has been produced. It was the duty of *every* artificer "to exercise his art rightly and

²⁸ Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 163. This also seems to have been the view of Professor Ames (*History of Assumpsit*, 2 HARV. L. REV. 1, 3) and of Mr. Justice Holmes (*The Common Law*, Lecture v, *Bailments*).

truly as he ought.”²⁹ The Statute of Labourers,³⁰ so called, included “those that make carriage by land or water” as well as innkeepers, shoemakers, saddlers, goldsmiths, horseshmiths, spurriers, and all manner of artificers and laborers. In such a general enumeration we should expect some differentiation between exceptional employments and others, but we find none. There is, in fact, nothing exceptional in the occupation of carriage or peculiar to it except the fact that the relative position of carriers in society has advanced enormously in importance.³¹ The carrier solicits public favor and professes to deal with all who come, but so does the ordinary trader. Bailment is incidental to the business of carriers and innkeepers, but no more so than to the business of the keeper of a warehouse, a garage, or a repair shop. The carrier is now an insurer, but four hundred years elapsed between the first mention of common carriers in our books and the formulation of this rule.

This theory of the exceptional nature and responsibility of stated common employments naturally required an explanation of

²⁹ Fitz-Herbert, *Natura Brevium*, Hale's ed., p. 214.

³⁰ 25 Ed. III., Stat. 1, A. D. 1350: “. . . Wherefore be ordained and established the things underwritten; that is to say . . . that they that make carriage by land or by water, shall take no more for such carriage to be made, than they were wont the said twentieth year and four years before: also that cordwainers nor shoemakers shall not sell boots nor shoes, nor none other thing touching their trade, in any other manner than they were wont the said twentieth year. And that goldsmiths, saddlers, horseshmiths, spurriers, tanners, curriers, tawers of leather, taylors, and all other workmen, artificers and labourers, and all other servants not specified, shall be sworn before the said justices, to do and sue their crafts and offices in the manner as they were wont to do the said twentieth year, and in the time before, without refusing the same because of this ordinance. And if any of the said servants, labourers, workmen, or artificers, after such oath made, do contrary to this ordinance, he shall be punished by fine, ransom, and imprisonment, according to the discretion of the said justices. . . . And that the said justices have power to enquire and make due punishment of the said ministers, labourers, workmen, and other servants whatever, and also of hostlers, herbergers, and of those that sell victual by retail, and other things not specified, as well at the suit of the party, as by presentment, and to hear and determine, and put these things in execution by exigent after the first *capias*, if need be, and to depute other under them, so many and such as they shall see best for the keeping of this present ordinance. . . .”

³¹ The earliest carriers were porters, boatmen, and the like. See *Beverley Town Documents* (Selden Society), p. 22, dealing with the period 1300-1600, where there is a reference to the reading of “the old order of porters, and creelmen and other common carriers,” — “*aliis communibus cariatoribus*.” This is one of the earliest instances of the use of the precise term “common carrier.”

why, for example, smiths, farriers, and the like are not now engaged in a common or public employment, and this has been attempted on the basis of monopoly,³² — economic changes having altered the position of the smith and farrier in society, while that of the carrier and innkeeper has remained the same. But the theory does not bear analysis. It seems reasonable that a modern apartment house should be under different responsibilities from an ordinary hotel. One can understand also that a tap line or a railroad built on private property to carry freight from one building to another of a manufacturing plant should be under different responsibilities and duties from a road between Buffalo and New York. But one is not necessarily more of a monopoly than the other, and it is therefore difficult to see why, on that ground, one should be classed as public or common and the other as private. The essence of privacy is monopoly. The explanation is even less satisfactory if we go farther back. No distinction based upon monopoly between a private and a common carrier prior to the year 1600 has been set forth, and no explanation has been offered as to why an innkeeper should choose the monopoly (if any) of a common inn in preference to a private inn, free from the duties of a common innkeeper,³³ and certainly no evidence is at hand of the existence of

³² Beale & Wyman, *Railroad Rate Regulation*, chap. 1, § 12. "It will be noticed that the principle of law which permits the regulation of these callings has not been abandoned in the smallest degree, though the conditions calling for its application in modern times have greatly changed. Whenever the public is subjected to a monopoly, either because of legal grant, as in the case of the medieval guilds and markets, or because of the actual conditions of life, as in the case of the village surgeon or smith, the power of oppression inherent in a monopoly is restricted by law — whether by the common law, applied by the courts or by special legislation. Whenever on the other hand competition becomes free, both in law and in fact, the need of governmental regulation ceases; public opinion ceases to demand such regulation, and the law withdraws it. In this way certain of the trades and classes of trades just enumerated having become competitive, the law has ceased to regulate them, not because of a change of legal principle but because of a change in actual economic conditions."

³³ It was only the common innkeeper who was subject to peculiar duties. See *Anon.*, Palmer 367 (21 Jac.), being an indictment for putting up a sign and keeping an inn, on the ground of nuisance. It was resolved "that it is lawful for any subject to erect a common inn and sign; and for this reason that he who erects a sign, '*charge luy mesme al republique*'"; and it was held that "every one who comes if he requires lodging shall have action on the case if this is denied." It was also held "that if the hostler pulls down his sign he is not bound to 'herberger,'" unless as Lee, Chief Justice, said, "he keeps and continues a common inn after the sign is destroyed."

luxurious hotels where people of wealth made their homes in 1600, — the basis of the distinction at present made between common and private inns.

When we consider the principle of monopoly as producing in the early days the supposed distinction between classes of callings, its failure is clearly apparent, for no evidence of any kind is offered that carriers were less numerous than butchers, or that innkeepers were fewer than carpenters, or barbers than weavers. Tailors were no less numerous than fullers, so far as the evidence goes, and they were, in 1400, numerous enough in Beverley to have a guild of their own.³⁴ So were the barbers and surgeons, and it is noteworthy that the guild at that time provided for a tax upon itinerant surgeons who were in the town over eight days. Monopoly, therefore, cannot be accepted as an explanation of the distinction between public and private callings, either at present or in the distant past, for it does not explain the distinctions within a calling or account for the difference supposed formerly to exist between such tradespeople as innkeepers and tailors, and such as carpenters and brewers, and it fails to account for the present-day difference in the treatment of a city hotel, struggling under competition, and a coal company absolutely controlling the coal supply of a city or state.

The reason for this failure is neglect of the facts. Common carriers were not anciently contrasted with carpenters or merchants or drapers. It is a mistake to suppose that the instances of the innkeeper, victualler, taverner, smith, farrier, tailor, carrier, and ferryman are in any way exceptional as regards their public character. From the earliest times one who was engaged in a given occupation as a business was described as being in a common employment, otherwise the employment was private. In Leet Jurisdiction of Norwich³⁵ during the period 1374 to 1391 are to be found instances of the common purchaser, common merchant, common huckster, common brewer, common fripperer, common cooker-up, common touter. In the Year Books we have the common inn or innkeeper,³⁶ common merchant,³⁷ common mareshal,³⁸ common

³⁴ See Beverley Town Documents, *supra*, pp. 45, 75, 100, 102.

³⁵ Selden Society Pub.

³⁶ Y. B. 2 Hen. IV. 7, pl. 31; Y. B. 9 Hen. IV. 45, pl. 18; Y. B. 22 Hen. VI. 21, pl. 38; Y. B. 5 Ed. IV. 2, pl. 20.

³⁷ Y. B. 7 Hen. IV. 44, pl. 11.

³⁸ Y. B. 19 Hen. VI. 49, pl. 5.

school-master,³⁹ common tavern,⁴⁰ common surgeon.⁴¹ In the Beverley Town Documents⁴² are to be found the common shaver, common bellman, and common makers and venders. In the later books we find the common farrier,⁴³ common carrier,⁴⁴ common hoy-

³⁹ Y. B. 9 Ed. IV. 32, pl. 4.

⁴⁰ Y. B. 21 Ed. IV. 19, pl. 22.

⁴¹ Y. B. 9 Ed. IV. 32, pl. 4. The meaning of the term is aptly illustrated by the Statute 34 & 35 Hen. VIII. (1542-3), ch. 8, entitled,

"An Act that Persons, being no common Surgeons, may
administer outward Medicines.

"Where in the Parliament holden at Westminster in the third year of the King's most gracious reign, amongst other things, for the avoiding of sorceries witchcrafts and other inconveniences, it was enacted, that no person within the city of London, nor within seven miles of the same, should take upon him to exercise and occupy as physician or surgeon, except he be first examined approved and admitted by the Bishop of London and other, under and upon certain pains and penalties in the same act mentioned; sithence the making of which said act, the Company and Fellowship of Surgeons of London, minding only their own lucre, and nothing the profit or ease of the diseased or patient, have sued troubled and vexed divers honest persons, as well men as women, whom God hath endued with the knowledge of the nature kind and operation of certain herbs roots and waters, and the using and ministring of them to such as been pained with customable diseases, . . . and yet the said persons have not taken any thing for their pains or cunning, but have ministred the same to poor people only for neighborhood and God's sake, and of pity and charity. And it is now well known, that the surgeons admitted will do no cure to any person, but where they shall know to be rewarded with a greater sum or reward than the cure extendeth unto; . . . for although the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money and do little therefore, and by reason thereof they do oftentimes impair and hurt their patients, rather than do them good:

"In consideration whereof, . . . be it ordained established and enacted, by authority of this present Parliament, That at all time from henceforth it shall be lawful to every person being the King's subject, having knowledge and experience of the nature of herbs roots and waters, or of the operation of the same, by or within any other the King's dominions, to practice use and minister in and to any outward sore uncome wound apostemations outward swelling or disease, any herb or herbs, ointments baths pultess and emplaisters, according to their cunning experience and knowledge in any of the diseases sores and maladies before said, and all other like to the same, or drinks for the stone strangury or agues, without suit vexation trouble penalty or loss of their goods; . . ."

⁴² Selden Society Pub.

⁴³ Fitz-Herbert, *Natura Brevium*, Hale's ed., p. 214.

⁴⁴ *Rogers v. Head*, Cro. Jac. 262 (1611); *Matthews v. Carrier*, etc., 1 Keb. 852 (1663); *Owen v. Lewis*, 3 Keb. 39 (1673); *Sparrow v. Neal*, 3 Keb. 278 (1674); *Anon.*, 12 Mod. 3 (1691); *Darlston v. Hianson*, Comb. 333 (1696); *Tyly v. Morrice*, Holt 9 (1700); *Skinner v. Upshaw*, 2 Ld. Raym. 752 (1702); *Coggs v. Bernard*, 2 Ld. Raym. 909 (1704).

man,⁴⁵ common kiddler,⁴⁶ common chyrurgeon,⁴⁷ common baker,⁴⁸ common brewhouse,⁴⁹ common lighterman,⁵⁰ common mill,⁵¹ common glasshouse,⁵² common oven,⁵³ common boat-man,⁵⁴ common ferryboat,⁵⁵ common badger,⁵⁶ common distiller,⁵⁷ common porter,⁵⁸ common grist-mill,⁵⁹ common drover,⁶⁰ common table-keeper,⁶¹ common ale-house,⁶² common cook,⁶³ common tipler,⁶⁴ common balance,⁶⁵ common builder.⁶⁶ This list would suggest either that the range of common employments must be greatly extended beyond that generally accepted,—and the subsequent shrinkage explained,—or that “common” does not have the significance usually ascribed to it, as characterizing and distinguishing one occupation from another. Not monopoly, or bailment, or necessity will be found differentiating all these employments from the few not

⁴⁵ Rich v. Kneeland, Hob. 17 (1614).

⁴⁶ Bray v. Hayne, Hob. 76 (1615).

⁴⁷ Everard v. Hopkins, Bulst., pt. 3, p. 332 (1615).

⁴⁸ Wilton v. Hardingham, Hob. 129 a (1617).

⁴⁹ Jones v. Powell, Palmer 536 (1628).

⁵⁰ Symons v. Darknoll, Palmer 523 (1629); 1 Strange 690 (1726).

⁵¹ Kemp v. Gord, Style 421 (1654).

⁵² King v. Norris, 2 Keb. 500 (1670).

⁵³ Lloyd v. Goffe, 2 Keb. 880 (1672).

⁵⁴ King v. Roberts, 4 Mod. 101 (1693).

⁵⁵ Rex v. Roberts, Comb. 193 (1693).

⁵⁶ Bray v. Hayne, *supra*.

⁵⁷ King v. Lamnos, Skinner 562 (1695).

⁵⁸ Coggs v. Bernard, *supra*.

⁵⁹ Rex v. Channell, 2 Strange 793 (1727).

⁶⁰ Fitz-Herbert, Loffice et Auctorité de Justices de Peace (London, 1617), p. 79.

⁶¹ *Ibid.*, p. 17.

⁶² *Ibid.*, p. 77.

⁶³ *Ibid.*, p. 17.

⁶⁴ *Ibid.*, p. 17.

⁶⁵ *Ibid.*, p. 94.

⁶⁶ Sir William Jones, The Law of Bailment, p. 100. The context is instructive. The learned author says:

“ . . . In regard to the distinction before mentioned between the *non-fesance* and the *mis-fesance* of a workman, it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or, in the case of a *common* trader, strongly implied; of which Blackstone gives the following instance: ‘If a *builder* promises, undertakes or assumes to *Caius*, that he will build and cover his house within a time limited, and fails to do it, Caius has an action on the case against the builder for this breach of his express promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay.’ The learned author meant, I presume, a *common* builder, or supposed a consideration to be given; and for this reason I forbore to cite his doctrine as in point as the subject of an action for the *non* performance of a *mandatary*.” (Italics in original.)

somewhere called common. The list is so long and contains such different callings that we are led to the conclusion that the term "common" did not serve to distinguish one employment from another and that all occupations could be common.

What, then, did "common" mean? Simply "business," — business carrier, business tailor, business barber. A common surgeon was one who made a business of surgery, who practiced it commonly; a common tailor was one who was in the business of tailoring. In 1367 an order was made for porters and creelmen "who then exercised that craft commonly" *qui tunc communiter utebantur illa arte*, — a perfect illustration of the true meaning of the word "common."⁶⁷

The distinction granted to exist between common and private carriers is, therefore, wholly sound, — the word "common" describes the nature of the undertaking and marks off the carrier not from other classes of business men but from that carrier who carries, not as a trade or business, not for everybody, but for himself or some particular employer. He is in a common employment who is in it as a business; the word defines his *profession*, his undertaking. The word is used in exactly the same sense as in common harlot, common thief, common scold; that is, in an adverbial sense rather than an adjectival sense.⁶⁸ That the distinction was so easily recognized, was so much a part of the thought of the time, as to make the use of the word "common," meaning "in business," unnecessary is at least suggested by the frequently cited case against the innkeeper, who was not specifically described as a "common" innkeeper,⁶⁹ and is made plain by *Mason v. Grafton*,⁷⁰ where in an action for goods stolen from an inn it was moved in arrest of judgment "that he had not alleged to be in

⁶⁷ Beverley Town Documents, p. 21.

⁶⁸ Compare the phrase "common prayer" in the following passage from Fitz-Herbert, *Loffice et Auctoritie de Justices de Peace*, p. 14: "Item vous enquiera si tiel Ecclesiastical person que doit dire common praier . . . nad . . . dit et use . . . tous lour common et ouvert praieres, en tiel order et forme come est mencion en le liuer del Common prayer authorized per parliament, et nul auter au autrement . . ." Compare also the expressions "common market," "common prison," "common proclamation," "common expenses," "common highway," "common policie," "mercatix publica" (business woman), "commene bieres," "common wealth," and the like.

⁶⁹ Y. B. 11 Hen. IV. 45, pl. 18. See also Y. B. 2 Hen. IV. 7, pl. 31. Y. B. 9 Hen. IV. 45, pl. 18.

⁷⁰ Hobart 245 b.

communi hospitio. . . . Yet because the declaration laid in the custom for common inns, and then laid that he *Hospitabus in Hospitio*, the plaintiff had judgment. For it shall be intended (and it is) *Domus non Hospitium* if it be not *commune*."

The importance of the early distinction between common (or public) and private, is easily comprehended with a little consideration of social conditions. The reader need scarcely be reminded that in regions remote from settled communities and in primitive societies many occupations, such as blacksmithing, weaving, brewing, and milling, are carried on privately, without the slightest reference to the public at large. In Mexico today the traveller into remote regions reaches *haciendas* quite as complete in their appointments as small villages, where he may expect to receive food and lodging for the night. But a blacksmith, weaver, brewer, or miller working under such conditions would not be a common blacksmith, common weaver, common brewer, or common miller, and the proprietor extending hospitality in such circumstances, though for reward, would not be a common innkeeper. In medieval times merchant strangers were arbitrarily assigned to "hosts" who were responsible for their good behavior.⁷¹ Travelling nobles often lodged in the religious houses without invitation,⁷² but these houses were not common inns. "One lodges with me or in the house of a husbandman, which is not a common inn, although his goods are taken from his possession, his action fails."⁷³ The servant buying for his lord was a private not a common merchant. Swinfield in the thirteenth century had his farrier,—an illustration of a private not a common farrier.⁷⁴

⁷¹ Compare 3 Rot. Parl. 553 (6 Hen. IV.): "39 Item, come en le darrein Parlement estoit ordeigne, que les ditz marchantz ne soient demurantz en autre lieu sinoun ovesque hostes a eux assigners, en graunde arerissement de lour estates: Pleise a votre dite Hauteesse d'ordigner en ycest present Parlement qu'ils purront prendre lour hostes par lour mesmes, & tenir lour hostell en le manere come ils ont fait devant ces heures.

"Soit l'Estaut eut fait tenez & gardez."

⁷² Social England, vol. 2, p. 358. Stat. 3 Ed. I. was aimed at the redress of the practice.

⁷³ Y. B. 22 Hen. VI. 21, pl. 38. It is to be observed generally that the word "inn" formerly had the well-defined meaning of "house," "residence," like its Latin and Norman French equivalents "*hospitium*" and "*hospicium*." "Common inn," therefore, was equivalent to "public house."

⁷⁴ Cunningham, History of English Industry and Commerce, Early and Middle Ages, p. 245. See also pp. 575, 653.

That the word "common," thus seen to be associated with all kinds of employment and to make a natural division within the employment, was used in the meaning here given it, is further evidenced by the early cases discussed below.⁷⁵

It is scarcely open to dispute, therefore, that all trades mentioned in the books were on occasion called "common," that the private was distinguished from the public exercise of a trade, and it is difficult to see how "common," in the earliest uses as applied to all trades, can have any significance other than the one at the present time limited to a few trades, — that is, profession to serve all. As applied to innkeepers and carriers, the sense is uniformly the same even back to the earliest cases. Unless "common" was used in one sense for carriers and in another for other occupations, it follows that "common" means, and meant in this connection, "open to public service." This view does not, as a matter of fact, contradict the cases on which the modern distinction between carriers and other businesses is rested, for the error that has been made has been due rather to a wrongly placed emphasis in the

⁷⁵ In *Bray v. Hayne*, *supra*, in an action on the case for slander, there was a verdict for the plaintiff. "And yet judgment was given against him that those words bear no action: For every falsehood charged upon a man in his private dealings will not bear action; But if a man of a publick occupation or trade be charged with deceit in that it will bear action. And, therefore if this man had been a common kiddy or badger, and had been charged with selling by false measure, it would have born action. . . ." The only possible meaning in "common" here is "public," and "public" can signify here nothing but serving the public, in the business of.

The same distinction within trades is made clear in the frequent actions under the Statute of Labourers, 5 Eliz., as in *Hobbs v. Young*, Comb. 179, and *Ipswich Taylors' Case*, 6 Coke, pt. 11, p. 53, where the private cook, tailor, brewer, etc., is distinguished from him who makes a public use and exercise of any of those trades to all who will come. It is true that this statute is different from a rule of law establishing definite responsibilities for such trades as are called common, but though it does not establish for such trades such a duty as that of serving all indifferently, it does emphasize the difference between a private tradesman and one exercising the same kind of trade publicly.

In *Jones v. Powell*, *supra*, in an action on the case for maintaining a brewhouse as a nuisance, the words "common," in the sense of public, and "private" are contrasted. It was objected "that the action does not lie because it is a private brewhouse which is erected." To this it was answered "that the cause of the action is the insalubrity and unwholesomeness that arises on account of the building, not the public or private 'cause' of its erection. . . ." "And it was agreed by the whole Court that the erecting of a common or a private (*common ou private*) brewhouse is not a nuisance per se."

phrases "common carrier," etc., than to a mistake in the cases which are discussed in the footnote.⁷⁶

⁷⁶ To begin with the frequently cited case of the veterinary surgeon, Y. B. 19 Hen. VI. 49, pl. 5. The court decided that it was necessary to prove one a common horse surgeon to charge him for loss of a horse placed under his care. This case has been treated without any attention to the word "common," as showing the public character of the curing of man or beast, and the public element is based upon the scarcity of practitioners. As to the latter, it is sufficient to point out that no evidence in support of the assumption is adduced, and that, on the other hand, in Beverley about this time barbers and surgeons were numerous enough to have a guild, which taxed strangers of these professions who remained in the town over eight days. The true meaning of the case would seem to be that without an express assumpsit charged, you could not hold a surgeon for his work unless he were a common surgeon, that is, one in that business. This gives point to "common," not to "surgeon," allows for the existence of non-common surgeons, and avoids any necessity of looking for a difference marking surgeons as a class.

The tailor was, by the remark in Y. B. 22 Ed. IV. 49, pl. 15, bound to serve all, that is, he was in the same class as the *common* innkeeper and the *common* smith. The statement is only to the effect that he was, as they were, a bailee, and the parenthetical "he is compelled by law to do it" measures the obligation under which the tailor worked as a common tailor. For there is no reason why innkeepers and smiths should be common or private and tailors all common. Such a conclusion, on the theory of monopoly, could be reached only on the ground that tailors were scarcer than doctors or smiths. Brian plainly is speaking of a common tailor, just as plainly as in the Anon. case, Keilw. 50, pl. 4, it is a common smith and a common inn that are discussed, though "common" is omitted. There is never any doubt of the two classes, — private and common, — in these two employments.

The latter case sets off the builder who bargains to build a house from the smith and innkeeper, and again that distinction is explained as due to monopoly. The case, rightly viewed, illuminates the whole question. Taking a common innkeeper as the one who is in the innkeeping business, and the smith under peculiar duties as the one who runs a smithy as a business, it is easy to see the difference in the builder in the case supposed. The others, when they do exercise their trades privately, are not in business, are not serving the public. Likewise, the builder, when he undertook privately on the basis, — as the court says, — of an agreement. The important element was not that the employer, because of supposed competitive conditions existing in that occupation as distinguished from others, had time to bargain, but that the builder's time was hired for a stated period. The contract took him out of the position of making a continuing offer of services to any newcomer, whereas the surgeon or innkeeper or barber or smith is always ready for the next customer and is at least tacitly offering to serve him. See also n. 61, *supra*.

So of the victualler. The existence of bakers' guilds and the importance of the assizes of bread and ale show the absence of monopoly, of the existence of which, indeed, no evidence is offered. The important fact is the selling, the dealing as a business man, and only when so dealing was the baker common or public and under these duties of general service. The regulations such as the assize were not grounded upon the monopoly of the manorial baker or of the bakers' guild, but upon the public or

The carrier cases are all cases of common carriage, and the distinction within the occupation is everywhere manifest. Nowhere is monopoly suggested as the distinguishing characteristic. A distinction based on monopoly would require proof that the common carrier had some kind of a monopoly which the private carrier did not have, or that "common" was synonymous with "monopoly." The plain meaning of the cases is the simplest solution of all the difficulties, — the common was the public, the professional, the business carrier or other trader.

We may reasonably conclude, therefore, that, so far as the carrier's *business* is concerned, it is no different from any other business. The carrier, like every other business man, purports to serve and to deal with the public. Business is impersonal; in ordinary course it is merely a question of merchandise or other exchangeable value on the one hand and money on the other. A man is engaged in business when he solicits the favor of and undertakes to deal with persons *indifferently* for profit. This is the common characteristic of all business and at once its identification and definition.

The disappearance of this conception from our law in the case of all ordinary businesses and its retention in the case of carriers is to be explained partly by economic and social changes and partly by judicial misinterpretation of the early cases. That the disappearance did not take place suddenly is evidenced by the frequently cited cases of *Gisbourn v. Hurst*, *Lane v. Cotton*, and *Coggs v. Bernard*, decided at the beginning of the eighteenth century and discussed in the note,⁷⁷ which still assert the ancient doctrine.

business nature of the employment, and the duty of indiscriminate service was a business or common duty, not a duty of the baker as a baker.

The innkeeper was not from time immemorial regarded as a public servant. The common innkeeper was so regarded. See n. 33, *supra*. Nothing in the early cases suggests a basis for the contention that the occupation itself was peculiar or public or otherwise differentiated. If common it was peculiar and public, that is if one proposed to serve the public he must serve it; if he purported to be in business he was in a public employment, whatever that employment was, and was a "common" servant.

The miller may, on occasion, have had a monopoly affecting the public; but no case is cited which ascribes the public character to a mill on the ground of monopoly, and there are many indications that mills were numerous. In Borough Customs, p. 37, a penalty is prescribed against bakers who hired mills. A favorite example of *damnum absque injuria* in the Year Books was where one erects a mill on his own land to the prejudice of a mill on his neighbor's land.

⁷⁷ In *Gisbourn v. Hurst*, 1 Salk. 249 (1710), the court still retained the ancient con-

But with the inventions of Arkwright, the writings of Adam Smith, and the spread of the idea of *free* trade, a great change took place in business conditions toward the close of the eighteenth century.⁷⁸ In ordinary trades there ceased to be any need for a distinction between the *common* and the private exercise of a trade. With the repeal of the Statute of Apprentices in 1814 the distinction made in such a statement as "To make a man of a trade, he must be apprentice to him who did openly, commonly, and by publick

ception. This was an action in trover for goods taken by distress in a barn from the wagon of one who carried cheese to London, and usually loaded back with goods for all persons indifferently.

" . . . It was agreed *per curiam*, that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employment, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a farther consideration; and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is as to this privilege, a common carrier; for the law has given the privilege in respect of the trader and not in respect of the carrier. . . ."

But this case was misinterpreted in the first sentence of the earliest text-book (Jeremy) on the law of carriers, which read: "The law has avowedly given the privilege of its special protection in respect of the trader, and not the carrier," and was the center of much discussion by writers, courts, and lawyers in the past century. The meaning of "privilege" in the case referred to is the freedom from distraint. By the term "in respect of the trader" the court meant that the privilege existed, not because the plaintiff was a *carrier*, but because he was a *common* carrier, that is, because he was a *trader*, or in the business of *carriage*.

Even the language of Chief Justice Holt in *Lane v. Cotton* (1701) seems quite plain. He says:

"If a man takes upon him a publick employment, he is bound to serve the publick as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse. Keilw. 50. Against an inn-keeper refusing a guest, when he has room. Dier. 158, pl. 32. Against a carrier refusing to carry goods when he has convenience, his wagon not being full. He had known such action brought, and a recovery upon it, and never disputed. So an action will lie against a sheriff, for refusing to execute process. The same reason will hold, that an action should lie against the post-master, for refusing to receive a letter, etc." 1 Ld. Raym. 646, 654 (1701).

The same is true of his language in *Coggs v. Bernard*, 2 Ld. Raym. 909, 912 (1714), where he said:

"The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. . . . There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is chargeable by his trade, and a private person cannot be charged in an action without a reward. . . ."

⁷⁸ Cunningham, *supra*, *Laissez Faire*, p. 609.

profession sell, and not privately by stealth,"⁷⁹ would cease to be necessary and would be gradually dropped as meaningless.

In the case of the carrier's trade, however, there were peculiar internal characteristics which brought it constantly before the courts. In the early history of carriage before the advent of railroads, the special feature that had to be dealt with was bailment, and the liability for loss of goods, which was finally developed into a so-called insurer's liability. In the course of time, with the introduction of railroads, other special and peculiar features, such as the enjoyment of peculiar privileges, franchises, and rights of way, became characteristic of carriage, and the relative importance of the carrier's calling was greatly accentuated. There was nothing more natural than that the word "common," still retained by carriers and absent from most other occupations, should be assumed to be indicative of peculiar duties and of peculiar subjeclability to state control.

But as we have seen, this view is erroneous, and not supported by the cases upon which it purports to rest. Under a true interpretation of the common law all business is public, and the phrase "private business" is a contradiction in terms. Whatever is private is not business, and that which is business is not private. Every man engaged in business is engaged in a public profession and a public calling. The parties to business are the merchants on the one hand and the public on the other. The merchant or trader opens his doors into the public street and invites all who pass to enter. By public advertisement and circularizing he solicits patronage from all who read. He extends an invitation or makes a continuing offer to all indifferently. He seeks credit, employs the machinery of credit, and by so doing involves the fortunes of the community at large. He floats his securities in the public market. His good-will, always a principal asset, consists entirely of the likelihood that the people in general will avail themselves of the inducements which he has offered. Reason and authority alike show the soundness of this view.⁸⁰

⁷⁹ Shepherd, *Office of Justice of the Peace* (1652), vol. 1, ch. 20.

⁸⁰ The German Commercial Code recognizes this practically by requiring the registration of traders as such. Staub's *Kommentar zum Handelsgesetzbuch*, vol. 1, §§ 8-16. See also Gadsby, *Commercial Registration in Japan*, 28 L. QUART. REV. 305 (1912); Pallares, *Derecho Mercantil* (Mexico, 1891), p. 910; Lyon-Caen and Renault, *Droit Commercial*, vol. 1, § 10.

The importance of this principle in dealing with present-day problems is far reaching, and to the fact that business as such throughout the course of its modern development has been suffered to be, as it were, without law unless it could be brought into some exceptional class, is to be attributed much of the difficulty which now prevails. This distinct doctrine of the common law, — the doctrine of common employment, — needs to be vitalized and intelligently applied. How remote this conception lies from our modern thinking is well illustrated by the dissenting opinions in *Munn v. Illinois*⁸¹ and *Budd v. New York*,⁸² and by the opinion of the court in *State v. Edwards*.⁸³ In the first case Mr. Justice Field, dissenting, said:

“ . . . There is no magic of the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor’s or a shoemaker’s shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. . . . The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control. . . . ”

It is indeed true that legislative fiat cannot change the essential nature of things, and it is fortunately true that with a live recognition of the nature of business on the part of the courts and business men, a minimum of legislation will be either attempted or necessary. Passing by the subject of regulation as not being confined or peculiar to the phenomenon now under investigation, we may briefly advert to the duties generally conceded to be incident to common employments as such at common law, for these duties, as we now see, are not peculiar to common carriers, but are incident to businesses of every kind.

It is said, and the accepted view is, that in a so-called private business “a person has an absolute right to refuse to have business

⁸¹ 94 U. S. 113, 138 (1876).

⁸² 143 U. S. 517 (1892).

⁸³ 86 Maine 102, 29 Atl. 947 (1893).

relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property.”⁸⁴ It is scarcely to be presumed that such statements have, as a rule, been made advisedly after a full investigation of the materials, many of which have in fact only recently been made available through the publications of the Selden Society. The right to refuse to have business relations is one thing; the right to continue in business and have business relations with some and not with others in equal circumstances is a wholly different thing.

It is beyond dispute that arbitrary discrimination and refusal to deal are wholly repugnant to the profession of common employment. As said by Mr. Justice Doe in a case involving common carriers:⁸⁵

“A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. . . . He is under a legal obligation; others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. . . . A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common-carrier transportation. With such power, he would be a carrier, — a special, private carrier, — but not a common, public one. . . .”

Opposed as the supposed right of discrimination and of refusal to deal is to reason, it is no less so to that long line of cases the application of which has heretofore been confined to the supposedly

⁸⁴ *Delz v. Winfree*, 80 Tex. 400, 402, 165 S. W. 111 (1891).

⁸⁵ *McDuffee v. Portland & Rochester R. R.*, 52 N. H. 430, 447 (1873).

exceptional employments.⁸⁶ A rational and courageous extension of this great body of thought and experience to business generally should contribute much to the solution of modern trade problems.⁸⁷

⁸⁶ Shepherd, writing in 1652 (Office of Justice of the Peace), summarizes the law of trade as follows: "There are many laws that concern trading and traffique, which may be thus reduced. 1. None may exercise some trades before they have been trained up in them. 2. Tradesmen must sell true, not false and sophisticall commodities, especially provision. 3. They must sell at reasonable prices, and for moderate gain. 4. Bakers, brewers, and such like tradesmen must keep the assizes. 5. All tradesmen must sell by just weights and measures." Duty to sell at a reasonable price cannot co-exist with a right to refuse to sell at any price.

The idea of service was inseparable from the idea of business in the early law. The term "office" is used in the Year Books with reference to the most ordinary occupations. "Mystery" in the phrase "art and mystery" is not, as often asserted, equivalent to *maistrie*, a mastery of a craft, but is a corruption of a word meaning, not "mastery," but "ministry," "service." Beverley Town Documents, Selden Society Pub., introd., p. xlvii.

It is worthy of note that the Statute of Labourers, *supra*, refers to tradesmen as "ministers."

The following cases from the Year Books are of particular interest. Y. B. 21 Hen. VI. 55, pl. 12: "Paston, J., If I come riding along the highway to a town where a smith lives who has sufficient stuff to shoe my horse supposing it has lost a shoe, and I request him at a proper time to shoe it and offer him enough for his labor and he refuses so that my horse is later lost for want of shoes, because of his default, I say in such event I shall have action of trespass on the case." Y. B. 9 Ed. IV. 32, pl. 4: "Needham . . . and Sir in trespass against a man for taking a servant it is a good plea for the defendant to allege that he is a common school-master, and the father of the said servant brought him to the defendant to be instructed, wherefore . . . Littleton. In trespass for taking a servant it is a good plea for the defendant to allege that he is a common surgeon and the servant had broken his leg so that he could not walk and came to him to be cured etc. wherefore he etc."

⁸⁷ In the Court Baron (Selden Society), p. 31, may be found a precedent taken from a thirteenth century book of forms or instructions to the steward of the lord's court, to be used "when brewer or breweress refuseth to sell beer to the lord." It is as follows:

"Sir steward, the bailiff R(robert) by name, who is here, complaineth of Ellis Atte Well, who is there, that wrongfully and to the lord's despite he refused to sell beer to the use of the lord on such day he at such an hour in the year that was, whereas on the said day he had in his brewery sold beer new and old to his neighbours and to strangers; and wrongfully for this reason, that he, (Robert) prayed him debonairely and earnestly for the love of his lord that he would sell him of his beer in return for present and ready payment according to the assize which is provided and established; but this Ellis neither for prayer nor for admonishment nor yet for present and ready payment would confess that he had beer for sale, new or old, in secret or in public, for gift or sale to his lord or any of his folk, to the lord's damage for 40 s. or the shame for 20 s. by reason of the strangers that were there assembled. If confess etc.

"Tort and force and the damage of the lord of 40 s. and the shame of 20 s. and every penny thereof and all that is in the lord's despite, defendeth Ellis, who is here, against

Effective as this basic principle of the common law can be made by the courts in the administration of justice and the prevention of business abuses, its recognition should be scarcely less serviceable as a helpful guide to business men and an aid to legislators in the framing of constructive laws. The problem of holding companies and industrial combinations, for example, which in recent years has been much discussed in the United States, becomes simplified, for, with a positive duty of service to all resting on each subsidiary or business unit, the opportunity and temptation for oppressive conduct are lessened, and the importance of ultimate ownership and control is minimized. A commercial code based on the common law would differ from the French, German, and Japanese codes, which treat business empirically from the standpoint of its mechanism or of determinate classes of actors therein, by presenting a rational system dealing with business itself as a public profession.

Edward A. Adler.

BOSTON, MASS.

the sworn bailiff R(ober) by name, who is there, and against his suit and all that he surmiseth against him; and well he sheweth thee that on that day which the bailiff surmiseth nor at that hour nor within four days afterwards was any manner of beer, new or old, within his power, in barrell or out, to give or to sell even had one given him ten shillings. Again, sir, as to what he surmiseth, that on the same day he sold beer, new and old, to his neighbours and to strangers, privately and publicly, we answer and say right fully that he talketh idly, and we offer thee a besant of gold that lawfully it may be inquired of these good folk of the vill and if thou findest by good inquest of good folk of the vill that he had beer at that hour or within four days afterwards, at any hour of the said days, beer new or old, to give or sell, he obligeth himself in all his goods moveable and immoveable to do whatever thou seest fit.

"Therefore be this inquired."

ASSUMPTION OF RISK UNDER THE FEDERAL
EMPLOYERS' LIABILITY ACT

ON April 22, 1908, executive approval was given to the act of Congress known as the Federal Employers' Liability Act; which, stripped of its verbiage irrelevant to this discussion, is as follows:

"That every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . ."¹

¹ The constitutionality of this statute was sustained in *Mondou v. New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 50 (1912), upon the following ground:

"The natural tendency of the changes described is to impel the carriers to avoid

In *Seaboard Air Line Ry. v. Horton*² the court held that "by the phrase 'any statute enacted for the safety of employees,' Congress evidently intended federal statutes such as the Safety Appliance Acts and the Hours of Service Act"; and then proceeded to place upon the fourth section the following interpretation:

"It seems to us that sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk — perhaps none was deemed feasible."

The doctrine of assumption of risk, which the court thus engrafts upon the statute, is a common-law doctrine by which the employee,

or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

In that case the court also said:

"We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce."

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66 (1913), it is said:

"We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states. Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. 'The subject,' as observed by this court in *Second Employers' Liability Cases*, 'is one which falls within the police power of the state in the absence of legislation by Congress.' . . . By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of power which is granted in express terms must supersede all legislation over the same subject by the states."

² 34 Sup. Ct. 635, 639 (1914).

guilty of no fault, was denied recovery, notwithstanding his injury resulted from a danger created by the employer's negligence, if, after becoming chargeable with knowledge of the danger, he continued in the service without complaint. It is a doctrine against the injustice of which, in its application to modern railroad service, the legislation of the states has been chiefly directed.

If it be true that no question of law is to be regarded as finally decided until it has been rightly decided, the question whether this common-law doctrine is to be construed into the act should still be an open one, — certainly until it has received more thorough consideration than was given it in the case of *Seaboard Air Line Ry. v. Horton*,³ or in any other case in which a similar conclusion has been reached. The question is vital. Its decision necessitates a judicial determination of the character and purpose of the act, — whether the legislation was in furtherance of the policy evinced in the legislation of the states, or is in fact a reactionary measure designed to displace state legislation to the extent that the abolition of assumption of risk by the states had inured to the benefit of employees of interstate carriers.

If the present trend of judicial decision shall be adhered to, it is obvious that the act is worse than nugatory so far as concerns any beneficial result to interstate employees, in comparison with the rights secured to them under state legislation which the act supplants; and that the act, viewed as a regulation of interstate commerce, with this destructive principle of the common law engrafted upon it, so far from having a tendency "to promote the safety of the employees and to advance the commerce in which they are engaged," in fact relegates the subject to the crude and artificial rules of the common law, except as to that comparatively small class of "defects and insufficiencies" which result from the violation of statutes enacted for the safety of employees.

The Hours of Service Act does not deal with instrumentalities. The Safety Appliance Acts cover only a part of the appliances used in connection with "cars and engines." The common-law immunity to the carrier from the consequences of its own negligence would, therefore, be reinstated as to everything of a physical nature embraced in the comprehensive terms "machinery, track,

³ *Supra*.

roadbed, works, boats, wharves, or other equipment," and even as to "cars, engines, and appliances," except to the limited extent to which appliances to be used in connection with cars and engines have been prescribed by statute.

Judicial construction that thus makes the system of federal liability a legal hybrid, — partly statutory and partly common-law, — rests apparently upon the theory that the act does not "cover the subject," and that what is regarded as an omission in the act is to be "pieced out" by recourse to the common law. In other words, the conclusion reached in *Seaboard Air Line Ry. v. Horton*,⁴ is a departure from the principle stated in *Michigan C. R. Co. v. Vreeland*.⁵

Since, also, *Seaboard Air Line Ry. v. Horton* originated in the state of North Carolina, where assumption of risk has been abolished by statute, it is difficult to perceive from what source the court derived the common-law principle which it applied. Without considering the legal basis or source of authority of the common law as a rule of decision in the United States, the court assumed the existence of a *common-law* doctrine of assumption of risk, which state legislation is powerless to repeal, and which is available to "piece out" what was conceived to be an omission in the fourth section to deal fully with common-law assumption of risk.

The court apparently assumed that the act of Congress occupies with respect to the common law the same relation as an act of Parliament, and that the Liability Act, although enacted in the exercise of the exclusive power of legislation vested in Congress by the commerce clause of the Constitution, and as a distinct act of federal sovereignty, is to be regarded merely as an act amendatory of the common law. And what common law? Not the common law of the state, for the state had abolished the principle which the court applied.

Proceeding upon the assumption of such a common-law principle, which is beyond the power of the state to repeal, the court gave no apparent consideration to the fact that the unconditional liability created by the first section excludes that form of assumption of risk which at common law operates as a bar to recovery when the injury results "in whole or in part from the negligence of

⁴ *Supra*.

⁵ *Supra*.

any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Before proceeding to a technical construction of the act, or attempting to show that the fourth section, instead of giving rise to a defense in favor of the carrier, in fact extends the liability created by the first section, let us consider the anomalous character of the act with this doctrine of the common law construed into it.

The decision in the Horton Case imputes to Congress the inexplicable purpose of imposing the highest degree of liability for failure to comply with statutes enacted for the safety of employees, and, at the same time, of affording immunity to the highest degree of negligence of which the carrier can be guilty with respect to all other instrumentalities not covered by such statutes.

Can any intelligible reason be given why Congress should have intended thus to discriminate between such appliances as driving-wheel brakes, automatic couplers, grab-irons, draw-bars, running-boards, steps, and locomotive ash-pans, on the one hand, and bridges, trestles, roadbeds, tracks, ties, machinery, works, boats, wharves, and all other kinds of appliances and equipment, on the other? Can any reason be conceived why Congress, for the purpose of promoting the safety of employees or advancing interstate commerce, should have imposed absolute liability for the failure to equip cars and engines with the statutory appliances, not to be affected by the employee's knowledge of the omission nor to be mitigated by his contributory negligence, and yet, with respect to all other instrumentalities, have given to the carrier the benefit of the common-law defense of assumption of risk with the encouragement to negligence which that defense affords?

The explanation of the provision of the third section, forbidding the defense of contributory negligence even in mitigation of damages, and of the fourth section, forbidding the defense that the risk was one of the assumed "risks of his employment," when the injury to the employee results from the violation of a statute, is that Congress intended to compel compliance with its statutes by forbidding any defense in case of their violation. But, since it is impracticable to regulate by statute the whole matter of the construction, equipment, and maintenance of an interstate rail-

way, to the extent that the character and condition of the equipment is not, and in the nature of things cannot be, prescribed by statute, the existence of any "defect or insufficiency" due to the carrier's negligence, from which injury to its employee results in whole or in part, is made the conclusive test of liability.

When such a defect or insufficiency and its causal relation to the injury are shown, the liability is absolute and subject only to mitigation to the extent, to be determined by the jury, that the injury is attributable to the employee's contributory negligence.⁶

In the Horton Case the court draws the following distinction between "contributory negligence," which the act provides shall not bar a recovery, and "assumption of risk," which the court declares shall bar recovery:⁷

"Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee."

Can any reason be given why Congress should have intended to forbid recovery to an employee guilty of no fault, and yet allow recovery to an employee guilty of contributory negligence, which necessarily implies that he was chargeable with the same *knowledge* of the danger which resulted in the injury? Or can any reason be given why Congress should have intended to forbid recovery to an employee for merely remaining in the service with knowledge and without complaint, and yet allow recovery to an employee who, with the same *knowledge*, expressly and for valuable consideration contracted to exempt the carrier from liability?

Besides the policy of the act and the ground of its constitutionality declared in *Mondou v. New York, N. H. & H. R. R. Co.*,⁸

⁶ *Baltimore & O. R. Co. v. Darr*, 204 Fed. 751 (1913); *Grand Trunk W. Ry. Co. v. Lindsay*, 201 Fed. 836 (1912); *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94 (1912); *Illinois Cent. R. Co. v. Nelson*, 203 Fed. 956 (1913); *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 Fed. 949 (1911); *Philadelphia, B. & W. R. R. Co. v. Tucker*, 35 App. D. C. 123, 220 U. S. 608 (1910); and by the trial court in *Pedersen v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146 (1913).

⁷ *Supra*, p. 639.

⁸ *Supra*.

already quoted, we have the following statement of the court in *Pedersen v. Delaware, L. & W. R. R. Co.*:⁹

"... Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'"

Is it conceivable that the policy of the act, as thus twice declared by the court, could be more effectually defeated than by introducing into it the common-law defense of assumption of risk as to all dangers arising from defects and insufficiencies, except from violations of statutes? This defense encourages negligence. As observed by Judge Jaggard in *Rase v. Minneapolis, St. P. & S. S. M. R. Co.*:¹⁰

"The reasoning by which it is sought to be justified, carried to its logical conclusion, tends to result in this paradox: The more grossly the master is negligent, the more certain is the assumption of risk by the servant, and the master's exoneration. If the master be more careful, then the more doubtful is the servant's assumption of risk, and the more probable is the master's liability. The employer who is successfully careful and he who is extremely careless are equally protected. The exercise of care is discouraged, and a premium is put on negligence."

The doctrine of assumption of risk which thus gives immunity to the employer's negligence and compels the servant, as a last resort, to quit the service and stop the business in order to escape irremediable injury, is at variance with the ground upon which the constitutionality of the act was sustained. Such a doctrine had its origin in the relation of master and servant under conditions which affected the interests only of the employer and employee. It is an incubus upon the interstate commerce of the country with the important public interests which that commerce subserves. Under its baleful influence upon commerce, in time of peace trainmen, on becoming chargeable with knowledge of the carrier's negligence, must cease the transportation of passengers, mails, and freight, and in time of war, the transportation of troops as well.

⁹ 229 U. S. 146, 151.

¹⁰ 107 Minn. 260, 265, 120 N. W. 360, 363 (1909).

The doctrine of assumption of risk originated in the case of *Priestley v. Fowler*.¹¹ There is no more similarity between the reasons and policy upon which that decision is based, and the reasons and policy which called for the legislation embodied in the Federal Employers' Liability Act, than there is between a "butcher's van" and the physical equipment of an American trans-continental railway.

It is inconceivable that Congress should have intended to fetter the interstate commerce of the present day with the crude doctrines laid down by Lord Abinger in *Priestley v. Fowler*, which involved the question of liability of a butcher for injury to his servant resulting from an overloaded "butcher's van," — doctrines against which many of the courts have protested and the injustice of which, in their application to modern industrial conditions, has brought forth the various acts of remedial legislation in all the countries in which the common law of England has prevailed.

The interstate carriers of the United States are public service corporations. The commerce in which they are engaged and the instrumentalities by which that commerce is carried on were not conceived of at the time of *Priestley v. Fowler*. On that commerce depend the wealth, the happiness, and the civilization of the country. Employees of interstate carriers are indispensable instrumentalities or agencies in that commerce. The commerce must go on; employees cannot stop.

To free commerce from the fetters of the common law, — "to impel the carrier to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines," and thereby "to promote the safety of the employees and to advance the commerce in which they are engaged,"¹² — was the enlightened purpose of the act and the constitutional justification for this exertion of congressional power.¹³

¹¹ 3 Mees. & W. 1 (1837).

¹² *Mondou v. New York, N. H. & H. R. R. Co.*, *supra*, p. 51.

¹³ Senator Dolliver, discussing upon the floor of the Senate the Act of April 22, 1908, said:

"The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions."

Senator Borah, advocating the amendment of April 5, 1910, declared that,

"It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress, to shift the burden of

Before the enactment of this statute there was no federal law of negligence. The federal courts in the exercise of their jurisdiction in cases involving liability of railway companies to their employees, whether engaged or not in interstate commerce, applied the law of negligence as a part of the law of the state where the injury was occasioned. This statute, for the first time, creates a substantive federal right in favor of the employee, distinct from the right theretofore given him by the law of the state.¹⁴

The system of federal liability created by the act is exclusive of the law of the states upon the subject, which means that it is exclusive of the grounds of liability available to the employee under the state law, whether common-law or statutory, and of the grounds of defense, whether common-law or statutory, afforded by the law of the state to the interstate carrier. Just as the employee must look to the act for his cause of action, so the carrier must look to the act for its defenses. Unlike the liability under the law of the state, which originated in the common law and was subject to all the defenses available at common law, the system of federal liability is purely of statutory creation. The terms in which liability is imposed are exclusive of defenses which would defeat that liability.

There is no common law of the United States, except that in the construction of the Constitution and acts of Congress recourse may be had to the common law for the purpose of interpreting the technical terms employed, which otherwise would be unintelligible.¹⁵ The common law is essentially the law of the states. It exists as a part of the law of the states by virtue of its adoption by the states, and to the extent only that it is not in conflict with state institutions and is not repealed by state legislation. Although,

loss resulting from these casualties from 'those less able to bear it' and place it upon those who can, as the Supreme Court said in the *Taylor case*, 211 U. S. 281, 'measurably control their causes.' . . . The passage of the original act and the perfection thereof by the amendment herein proposed stand forth as a declaration of public policy to radically change, so far as congressional power can extend, those rules of the common law which the President in a recent speech at Chicago characterized as 'unjust.'" See also Doherty on Employers' Liability Act, p. 61.

¹⁴ Thornton on Federal Employers' Liability Act, § 1, pp. 4-5, note.

¹⁵ *Wheaton v. Peters*, 8 Peters (U. S.) 591 (1834); *Pennsylvania v. Wheeling & B. B. Co.*, 13 How. (U. S.) 518 (1851); *Smith v. Alabama*, 124 U. S. 465 (1888); *Moore v. United States*, 91 U. S. 270 (1875); *Gatton v. Chicago, R. I. & P. R. Co.*, 28 L. R. A. 556 (1895).

when the question is one of general and not merely of local jurisprudence, the federal courts will apply their own construction of the common law, irrespective of the decisions of the state courts, they nevertheless do so in administering the common law as the law of the states.¹⁶

In states which have repealed the common-law defense of assumption of risk,¹⁷ the defense cannot be set up as a bar to recovery in any case whether arising under the act of Congress or out of purely intrastate service. In cases arising under the act of Congress in states where this defense has not been abolished, the defense is not available, for the reason that the act cannot be "pieced out" by the law of the state. In other words, if the act of Congress cannot, as is universally conceded, be "pieced out" by legislation of the states repealing the common-law defense, how can it be "pieced out" by state legislation originally adopting the common law, or by this principle of the common law after it has been repealed by the states? In *Western Union Tel. Co. v. Commercial M. Co.*,¹⁸ Mr. Justice McKenna said:

"We have seen that one division of the supreme court of the state was of the view that if the prohibition rested on the common law its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding from the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the states. But however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it. How, then, can it have an efficacy that the statute changing it does not possess?"

From the nature of legislation by Congress, in the exercise of its power to regulate commerce, such legislation is exclusive of the law of the states. The defenses permissible under the act must be found in the express or implied provisions of the act. The question, therefore, is not whether the common-law defense of assump-

¹⁶ *Smith v. Alabama*, *supra*.

¹⁷ *Hough v. Railway Co.*, 100 U. S. 213 (1879).

¹⁸ 218 U. S. 406, 416 (1910).

tion of risk, as such, is available to the carrier; but whether it appears from the terms of the act that Congress intended to *create*, in favor of the carrier, a defense similar to that of common-law assumption of risk.

The object of the statute was to create in favor of the employee of a common carrier coming within its purview absolute liability for injury resulting "*in whole or in part*" from its *negligence* with respect to its *physical* instrumentalities, represented by its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," or from the negligence of its *human* agencies, represented by its "officers, agents, or employees"; and to make it negligence *per se* for such carrier to violate "any statute enacted for the safety of employees." As a corporation can act only through its officers, agents, or employees, such "defects or insufficiencies" as may occur in its physical appliances will necessarily be attributable to its human agencies. The two grounds of liability will therefore overlap each other.

The purpose of Congress to create unconditional liability when the injury results "*in whole or in part*" from such *negligence* is manifest from the provisions of the third and fifth sections, "that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery," and "that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

The provisions of the third section, "that no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury," and of the fourth section, "that in any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the *risks of his employment* in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury," indicate the determination of Congress to enforce the requirements of "statutes enacted for the safety of employees," by exempting the employee in the one case from the imputation of contributory

negligence, and in the other from the defense that dangers resulting from such violation were among the "risks of his employment."

The theory that the effect of the fourth section is to adopt the common-law doctrine that the employee by continuing in the service assumed the abnormal risks resulting from a "defect or insufficiency," due to the *negligence* of the carrier, unless its conduct involved also a violation of a statute enacted for the safety of employees, proceeds upon a misconstruction of the words "risks of his employment," and an inadvertent leaving out of consideration of the relation between the common law of England and legislation by Congress in the United States.

The words of the fourth section, "risks of his employment," mean the ordinary risks inherent in the business, — the unavoidable risks which are intrinsic, notwithstanding the performance by the carrier of its personal duties. They do not include the "secondary and ulterior" risks arising from abnormal dangers due to the employer's negligence.

The object of this section was not to adopt by *implication* the common-law defense of assumption of the risk of such abnormal dangers; its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the "risks of his employment" assumed by the employee.

Before the enactment of this statute, the carrier might exempt itself from liability under the common-law doctrine of the "choice of methods." The common-law duty of the master was only to exercise ordinary care to provide the servant with reasonably safe appliances. He was not required to use any particular appliance. Independently of the Safety Appliance Acts, the selection by the master of his appliances was a choice in which the courts would not undertake to control his discretion; it was not incumbent upon him to choose this or that specific appliance, but only to exercise ordinary care to provide reasonably safe appliances.¹⁹

¹⁹ In *Norfolk & W. Ry. Co. v. Cromer*, 101 Va. 667, 671, 44 S. E. 898, 899 (1903), the court thus states the common-law doctrine of the employer's choice of methods: "Courts and juries cannot dictate to railway companies a choice between methods, all of which are reasonably adequate for the purpose to be subserved"; and this doctrine has been applied to relieve the employer of civil liability even when the injury resulted from a violation of a safety statute.

In *Nottage v. Sawmill Phoenix*, 133 Fed. 979, 981 (1904), where the safety appli-

When it is considered that the first section imposes liability only for *negligence*, the purpose of the fourth section to extend that liability becomes apparent. The word "negligence" is a common-law term. It is therefore to be construed according to its common-law meaning. The act does not make the carrier an insurer of its employee's safety. By the first section it makes the carrier unconditionally liable for the *negligence* of its officers, agents, or employees and for its *negligence* with respect to its appliances. But at common law the authorities are in conflict as to whether the violation of a "statute enacted for the safety of employees" is negligence.²⁰ If it was not negligence, that is, if it involved no breach of duty to the *employee*, the risk of injury therefrom was a "risk of his employment." To remove doubt on this point and to make the violation of such a statute negligence *per se* under the system of federal liability, the fourth section provides that the employee "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury."

Let us consider more closely the significance of the words "risks of his employment." It is to be observed that the statute nowhere uses the phrase "assumption of risk." The words of the statute

ance act of Washington imposed a penalty for its non-observance, but contained no language similar to that of the fourth section of the act of Congress, the court said:

"This is a penal statute, enacted by the Legislature in the exercise of the police power of the state, and it contains no provision purporting to affect in any way the rules of law applicable to civil actions. It gives no hint of an intention to confer upon injured employees any new right enforceable in an action to recover damages, nor does it express a legislative intent to change the common law by abolishing defenses recognized by the common law."

In *Glenmont L. Co. v. Roy*, 126 Fed. 524, 528 (1903) (*contra*, *Narramore v. Cleveland, C. C. & St. L. Ry. Co.*, 96 Fed. 298 (1899)), which involved a similar statute, in the opinion delivered by Judge Sanborn and concurred in by Judge (now Mr. Justice) Van Devanter, it is said:

"The master is not required to supply the best, newest, or safest appliances to secure the safety of his servants; nor is he bound to insure the safety of the place or of the appliances he furnishes. His duty in this respect is discharged when he has exercised ordinary care to furnish a place and appliances reasonably safe and suitable for the use of his employees. . . . The factory act of Minnesota, which requires employers to guard or fence dangerous machinery so far as possible, does not abolish the defense of assumption of risk. It does not deprive parties of their right to contract regarding the risks of their avocations."

²⁰ 5 *Labatt on Master and Servant*, 2 ed., § 1909.

are "the risks of his employment," which include only the normal risks incident to the service, not enhanced by the employer's negligence. While the phrase "assumption of risk" in its modern acceptance includes the ordinary risks as well as those due to the employer's negligence, the words "risks of his employment" refer only to the ordinary risks, the existence of which implies no negligence on the part of the master.²¹

If full force be given to the maxim "*expressio unius exclusio est alterius*," as applied to the words of the fourth section, "such employee shall not be held to have assumed the *risks of his employment* in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," what would be the effect of the maxim? It would be that those "*risks of his employment*" which do not result from the violation of a statute enacted for his safety would remain as the "risks of his employment," which under the act are still assumed, and the existence of which would not imply negligence on the part of the employer. The words "risks of his

²¹ The proposition that the servant contractually assumes the risks of his employment, says Mr. Labatt, "of course amounts merely to an assertion . . . of the general principle that proof of negligence on the master's part is a prerequisite to the establishment of the servant's right to maintain an action." 5 Labatt on Master and Servant, 2 ed., § 1547.

"A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *primâ facie*, a servant does not assume any risk which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incident to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties." 3 Labatt on Master and Servant, 2 ed., § 894.

The English rule is thus stated by Blackburn, J., in *Morgan v. Vale of Neath Ry. Co.*, 5 Best & S. 570, 579 (1864), affirmed in *L. R. 1 Q. B. 149* (1865):

"If the master has, by his own personal negligence or malleasance, enhanced the risk to which the servant is exposed, beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like, no defense founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment."

In *Texas & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 321 (1913), it is said:

"At the common law the servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharge of the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of his employer's negligence in performing such duty."

employment" have a definite meaning distinct from the enhanced risks "due to the employer's negligence." An application of the maxim to one risk of the first class would certainly not justify the implication of risks of the second class.

Courts which hold that the common-law defense of "assumption of risk" is available under the act to bar recovery when the injury is attributable to the employer's negligence have fallen into the error, partly at least, by failing to distinguish between the significance of this phrase and the more restrictive words of the statute, "risks of his employment."

The phrase "assumption of risk" in its original significance embraced only such risks as were inherent, or at least involved no breach of common-law duty. In this sense the risks included are synonymous with those embraced in the phrase "risks of his employment." By subsequent application the phrase "assumption of risk" was extended to embrace the *enhanced* risks due to the employer's negligence, and thus was made to include two legal conceptions essentially different.

In its original sense, assumption of risk was a bar to recovery because, there being no breach of common-law duty, there could be no cause of action; while in its secondary sense the negligence of the employer gave rise to a cause of action which might be defeated by proof of the employee's continuance in the service with knowledge of the enhanced danger. The essentially different characters of the two defenses covered by the common-law phrase "assumption of risk" are clearly shown in the note to *Scheurer v. Banner R. Co.*:²²

"Assumption of risk, as applied to the ordinary risks of the service, is merely a rhetorical phrase used to connote the idea that the master is not an insurer against injuries resulting from dangers which cannot be removed by the exercise of due care upon his part. In the second sense, assumption of risk has a vastly different significance; it implies negligence on the part of the master and a *prima facie* liability, but it also implies a waiver of the effects of that negligence if it injures the servant."

"Assumption of risk," in its original sense, in which the risks assumed are equivalent to the "risks of his employment," except

²² 28 L. R. A. N. S. 1207, 1221 (1910).

as modified by the act, is an available defense; but "assumption of risk" in its secondary sense, as an "implied agreement" or a voluntary exposure to danger implied in the maxim "*volenti non fit injuria*," upon which the employer may rely to exonerate itself from liability for an injury resulting from a "defect or insufficiency" due to its own negligence, or as a form of contributory negligence with respect to such defect or insufficiency, is not an available defense under the act.

Assumption of risk, as a defense in its original sense, is *restricted* by the fourth section, which strikes from the category of "risks of employment" the violation by the carrier of "any statute enacted for the safety of employees." Assumption of risk, as a defense in its secondary sense, is *excluded* by the first section when the injury results "in whole or in part" from the *negligence* of the carrier or any of its officers, agents, or employees.

The differences between the common-law and federal systems of liability may be more clearly presented by a comparative statement of the common-law doctrines and the statutory provisions creating the federal liability.

At common law the initial defense open to the employer was that the injury was not due to any negligence for which it was responsible, that is, that the injury did not result from the breach of any duty which it owed to the employee, but resulted from an inherent danger of the business, or *wholly* from some fault of the employee.

If the injury resulted from a danger inherent in the business, such danger was, by the implied terms of the contract of service, assumed by the employee as a "risk of his employment," and among the risks so assumed was the danger of injury from the negligence of his fellow-servant and, according to numerous decisions, the violation by the master of "statutes enacted for the safety of employees."

The act admits in favor of the carrier these two defenses in bar of the action: (1) that the injury was due wholly to some fault of the employee, and (2) that the injury was due to a "risk of his employment," except to the extent that the latter defense is modified by the first and fourth sections of the act. The modifications are: (1) that the defense of fellow-service is displaced by the first section, and (2) that the violation "of any statute enacted for the safety of employees," which did not at common law neces-

sarily give rise to civil liability, is made negligence *per se* by the fourth section.

These are the only defenses in bar of the action, and they are open to the carrier not because they are common-law defenses and, *as such*, may be set up, but because they are defenses which are necessarily to be implied from the terms of the act. The act excludes all defenses in bar of recovery when the injury results "in whole or in part" from the negligence of the carrier or its officers, agents, or employees.

At common law, although the injury resulted from a "*defect or insufficiency*" in physical appliances admittedly "*due to the negligence*" of the employer, there could be no recovery if the employee continued in the service without complaint after becoming chargeable with knowledge of the danger arising from such defect or insufficiency.

This form of "assumption of risk" is not available under the act. The terms in which liability is imposed exclude this defense. The liability is unconditional. Congress did not employ the language "shall be liable in damages, *subject to the common-law defense of assumption of risk*," and without language, expressly or by implication, adopting this defense it cannot be invoked as a bar to recovery.

At common law there could be no recovery for an injury resulting from the negligence of a fellow-servant, the risk of injury from that cause being one which the employee was, by the implied terms of his contract, held to have assumed as a "risk of his employment."

Likewise the terms in which liability is imposed exclude this defense. The liability is unconditional. Congress did not employ the language "shall be liable in damages, *subject to the common-law defense of fellow-service*." It is therefore generally conceded that the defense of fellow-service is not available under the act. It should be observed, however, that the reason for the exclusion of this defense is, not that Congress was repealing the common law, but that, in the exercise of its independent power, it saw fit to make the principle "*respondeat superior*" a part of the system of federal liability as to all classes of "officers, agents, and employees."

At common law, although the injury resulted *in part* from a "defect or insufficiency" due to the employer's negligence, there could be no recovery unless such defect or insufficiency was the *proximate*

cause of the injury, without the intervention of any other efficient cause for which the employer was not responsible.

The terms in which liability is imposed exclude this defense, the first section creating unconditional liability when the injury results "in whole or *in part*" from the negligence of the carrier or any of its officers, agents, or employees. To entitle the employee to recover it is not necessary that such negligence should be the sole or even the proximate cause; it is sufficient if it is in the line of causation.²³

At common law, although the injury resulted from a "defect or insufficiency" due to the negligence of the employer, or from the negligence of any of its officers, agents, or employees, occupying the relation of vice-principal, there could be no recovery if the employee by his own negligence proximately contributed to the injury.

Under the third section "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

At common law also, when the employer's liability might not be otherwise evaded, recovery might still be defeated by proof of a contract, entered into by the employee, exempting the employer from liability.²⁴

This defense is not available under the act, the fifth section expressly providing "that any contract, rule, regulation, or device whatsoever, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

The act, when given what seems its proper construction, becomes what its distinguished authorship entitles it to be, — a perfect specimen of constructive legislation; while the introduction into its remedial provisions of this incongruous doctrine of the common law renders it altogether unintelligible.

Assumption of risk, in its secondary sense, as a common-law defense in bar of recovery when the employee was chargeable with knowledge of the employer's negligence, nullifies the first section

²³ *Grand Trunk v. Lindsay*, *supra*.

²⁴ *Griffiths v. The Earl of Dudley*, 9 Q. B. Div. 357 (1882).

of the act to the extent that that section imposes liability for injury resulting "in part" from "any defect or insufficiency" due to the negligence of the carrier. Congress realized that a variety of other causes might operate more or less directly in the production of an injury, such as the employee's continuance in the service with knowledge of the danger or his contributory negligence with respect to the danger. To avoid escape upon these or other grounds the act imposes unconditional liability for an injury resulting in whole or *in part* from such defect or insufficiency.

This defense nullifies the first section of the act to the extent that the language "shall be liable . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier" has been regarded as "displacing" the common-law defense of assumption of risk of the negligence of the fellow-servant.

If assumption of risk is displaced only in cases involving the violation of "statutes enacted for the safety of employees," why is not the common-law defense of the employee's assumption of the risk of injury from the negligence of his fellow-servant still available? The negligence of a fellow-servant is not the violation of "any statute enacted for the safety of employees," unless the liability act is itself such a statute.²⁵ How, then, is this form of assumption of risk excluded while assumption of risk of the carrier's negligence with respect to its instrumentalities is not excluded? Is it because the defense of the fellow-servant is not a part of the defense of assumption of risk?

"An early, if not the earliest application of the phrase 'assumption of the risk' was the establishment of the exception to the liability of a master for the negligence of a servant when the person injured was a fellow-servant of the negligent man."²⁶

Courts which hold that assumption of risk is a bar to recovery for injury resulting from a "defect or insufficiency" due to the carrier's negligence concede that assumption of risk cannot be invoked to defeat recovery for injury resulting from the negligence of a fellow-servant. And why not? The liability for both kinds of

²⁵ Philadelphia, B. & W. R. R. Co. v. Tucker, *supra*.

²⁶ Schlemmer v. Buffalo, R. & P. Ry. Co., 220 U. S. 590 (1911); Farwell v. Boston & W. R. R. Corp., 4 Met. (Mass.) 49 (1842).

negligence is imposed by the same language; both must stand or fall together. But for the unconditional liability imposed by the first section for both forms of negligence there would be stronger reason for holding that assumption of risk might be invoked, under the fourth section, to defeat recovery for the negligence of the fellow-servant than for the negligence of the carrier. The risk of injury from the negligence of the fellow-servant is a "risk of his employment" which, at common law, is assumed by the employee,²⁷ while the risk of injury from the employer's negligence, whatever may be the basis of its assumption at common law, is not a "risk of his employment" assumed by the employee.²⁸

This defense nullifies the third section of the act. It is impossible to reconcile the common-law doctrine that the employee's continuance in the service with knowledge of the risk resulting from a "defect or insufficiency" is a bar to recovery, with the peremptory provision of the third section that "in all actions hereafter brought against any such common carrier . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery."

The employee's *knowledge* of the defect or insufficiency, and of the consequent danger, is an element or factor common to both defenses of assumption of risk and contributory negligence.²⁹ Can this same knowledge be at once a bar to recovery when considered as an element of "assumption of risk" and not a bar to recovery when considered as an element of "contributory negligence"? Is it conceivable that such an anomalous state of the law was intended by Congress, — that Congress intended to preserve against contributory negligence the right of action which it created only to have that right of action defeated by "knowledge," one of the elements of contributory negligence, called by the name of "assumption of risk," — and thus to "palter with us in a double sense"? ³⁰

²⁷ *Norfolk & W. R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342 (1895).

²⁸ 3 *Labatt on Master and Servant*, 1 ed., § 894.

²⁹ *Norfolk & W. R. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489 (1905); *Buckner v. Richmond & D. R. Co.*, 72 Miss. 873, 18 So. 449 (1895); 1 *Labatt on Master and Servant*, 1 ed., §§ 207, 279-a, 296.

³⁰ "Whenever the evidence," says Mr. Labatt in stating the common-law rule, "suggests that the servant *knew* of the extraordinary risk which causes the accident,

The two defenses are so inextricably related that it is impracticable to discover the point at which the employee's "knowledge" as a bar to recovery, when considered as an element of assumption of risk, shall cease to be a bar to recovery when considered as an element of contributory negligence.

In *Narramore v. Cleveland, C. C. & St. L. Ry. Co.*,³¹ Judge Taft said:

"Assumption of risk is . . . the acquiescence of the ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence . . . is that action or non-action in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences."³²

Assumption of risk, then, consists in *knowing the danger and acting carefully*; while contributory negligence consists in *knowing the danger and acting carelessly*. Contributory negligence *includes*, as a part of its elements, every fact constituting assumption of risk. There cannot, therefore, be an assumption of risk, as a legal conception distinct from contributory negligence, which does not become merged into contributory negligence when the conduct of the employee goes to the extent of charging him with contributory negligence.

This defense, if indeed its basis is an implied contract, renders nugatory the fifth section of the act, that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which

the jury should be instructed regarding the legal consequences of such knowledge as justifying the inference both of an assumption of the risk and of contributory negligence."

³¹ *Supra*, p. 304.

³² In *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 12, it is said:

"Assumption of risk . . . obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the specific knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances *known* to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. . . . Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of *degree* rather than of kind."

shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."³³

It is not the purpose of this article to discuss the *rationale* of common-law assumption of risk of the employer's negligence. If Mr. Labatt states correctly that "the conception underlying the servant's assumption of a known risk is essentially that of an implied agreement," it is not to be reconciled with the fifth section. If Judge Putnam, in *Central Vermont Ry. Co. v. Bethune*,³⁴ correctly states that "There is nothing of the kind. It is merely a practical rule of common sense, which . . . is in itself independent of the contract of service or any other contract," the academic distinction between assumption of risk and contributory negligence disappears.

Of the "common sense" theory suggested in the Bethune Case it is sufficient to observe that it is at variance with the legislative intelligence underlying all acts of remedial legislation, including the third and fourth sections of the liability act as construed by the court, so far as concerns dangers resulting from the violation of statutes; and, assuming as it does that the employee *voluntarily* exposes himself to the danger of pain, maiming, and death, is at variance with every rational human instinct. It is at variance too with the opinion of the court in *Baltimore & P. R. R. Co. v. Landrigan*.³⁵

"We know of no more universal instinct than that of self-preservation, — none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to."

It is evident that the common-law defense, in bar of recovery, based upon the employee's continuance in the service with knowledge of a "defect or insufficiency" due to the negligence of an interstate carrier "in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," whether called by the name of "assumption of risk" or "contributory negligence," is not admissible under any express or implied provision

³³ Doherty on Federal Employers' Liability Act, p. 102.

³⁴ 206 Fed. 868 (1913).

³⁵ 191 U. S. 461, 474 (1903).

of the act, and that the introduction of the defense into the system of federal liability would render the act nugatory so far as concerns any beneficial result to interstate employees, — and worse than that, for the act of Congress supplants all the remedial legislation of the states, and, with this all-pervading doctrine of the common law judicially construed into the act, the last state of the interstate employee would be worse than the first.

Edward P. Buford.

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THE LAW SCHOOL. — The registration in the School on November 15 of each of the last twelve years is shown in the following table: —

	1903-04	1904-05	1905-06	1906-07	1907-08	1908-09
Res. Grad. . . .	4	1	1	—	2	—
Third year . . .	180	182	192	190	171	169
Second year . . .	201	232	216	199	198	207
First year	293	285	243	243	280	244
Specials	60	58	64	62	63	64
	738	758	716	694	714	684
	1909-10	1910-11	1911-12	1912-13	1913-14	1914-15
Res. Grad. . . .	—	2	3	6	4	5
Third year . . .	187	178	219	176	169	167
Second year . . .	191	238	217	186	197	197
First year	311	296	289	287	260	288
Unclassified . . .	—	82	76	84	64	68
Specials	70	3	4	5	1	5
	759	799	808	744	695	730

With the exception of the five special students and twenty-one Harvard "seniors," all the men now registered in the School are college graduates. As the Harvard "seniors" have in each instance completed the work prescribed for the A.B. degree, and as the five special students are all graduates of law schools, there is at present not a single man in the School who has not completed a college or law school course.

There are now in the School representatives from one hundred and forty-four colleges and universities, as compared with one hundred and forty-two last year and one hundred and thirty-six the previous year.

The following table shows the geographical source from which the twelve successive first year classes have been drawn:—

	Massachusetts.		New England outside of Massachusetts.		Outside of New England.		Total in Class.
	Number.	Percentage.	Number.	Percentage.	Number.	Percentage.	
1906	102	35	55	19	136	46	293
1907	92	32	44	15	150	53	286
1908	71	29	39	16	134	55	244
1909	71	29	34	14	138	57	243
1910	81	29	37	13	162	58	280
1911	72	29	33	14	137	57	242
1912	78	25	45	14	189	61	312
1913	65	22	32	11	200	67	297
1914	73	25	44	15	172	60	289
1915	59	21	34	12	194	67	287
1916	59	22	23	9	179	69	261
1917	65	23	29	10	194	67	288

In the present first year class eighty-eight colleges and universities are represented as follows:—

Harvard 80; Yale 24; Princeton 21; Williams 9; Dartmouth 8; University of Wisconsin 7; Brown University, University of Missouri, 6; Bowdoin College, University of Michigan, 5; Amherst College, Boston College, Cornell University, DePauw University, Grinnell College, Wesleyan University (Conn.), 4; Clark College, Colgate University, Hamilton College, University of Illinois, 3; Carleton College, Carroll College, University of Chicago, Columbia University, Holy Cross College, Indiana University, Johns Hopkins University, Leland Stanford Jr. University, University of North Carolina, University of Pittsburgh, Rutgers College, Tulane University, University of Virginia, Western Reserve University, 2; University of Alabama, University of Arkansas, Bates College, Beloit College, Bucknell University, University of California, Catholic University, University of Cincinnati, Colby College, Davidson College, Defiance College, Dickinson College, Drake University, Fisk University, Franklin College, University of Georgia, Iowa State College, Iowa State Teachers' College, Iowa Wesleyan University, University of Iowa, Juniata College, University of Kansas, Knox College, Lafayette College, Livingstone College, Louisiana State University, Massachusetts Institute of Technology, Middlebury College, Military College of South Carolina, Moravian College, University of Nebraska, Northwestern University, Ohio State University, Ohio Wesleyan University, Pennsylvania College, Pennsylvania State College, University of Pennsylvania, Ripon College, St. John's College (O.), Shurtleff College, Swarthmore College, Syracuse University, Trinity College (Conn.), United States Military Academy (West Point), University of Utah, Vanderbilt University, Wabash College, Washington University, Washington and Jefferson College, Washington and Lee University, Westminster College, Wofford College, Wooster University, 1.

THE TAFT LECTURES. — It was the privilege of the Law School, during the past month, to have as its distinguished guest former President William Howard Taft, now Professor of Law in the Yale Law School, who delivered a series of three lectures on "The Presidency: Its Powers, Duties, Responsibilities, and Limitations." Mr. Taft discussed the functions of our chief executive as viewed by one who has actually served in that capacity for four years, and not as one who theorizes at a distance. As the subject, from its nature, is one not covered by the authorities, the lectures were particularly valuable, not only as an adjunct to the course on Constitutional Law, but also to the student of general law and politics.

THE HARVARD LEGAL AID BUREAU. — The Harvard Legal Aid Bureau, incorporated last May for the purpose of rendering legal assistance gratuitously to persons unable to employ counsel, opened its office in Central Square, Cambridge, for its third year, on Wednesday, October 7. The membership for the coming year is made up as follows: A. C. Tener, President; C. B. Randall, Secretary; R. G. Bosworth, E. G. Fifield, E. W. Freeman, James Garfield, T. J. Hargrave, E. C. Kanzler, F. A. Nagel, T. H. Remington, Blair Reiley, H. Siefke, Jr., C. M. Storey, H. K. Urion, S. H. Wellman, R. W. Williams, from the Third Year Class; and F. G. Blair, R. W. Baker, F. L. Daily, T. W. Doan, W. W. Hodson, A. Jaretzki, Jr., P. V. McNutt, J. H. Philbin, W. F. Rogers, E. D. Smith, R. B. Wigglesworth, from the Second Year Class. These men are elected for the legal ability shown in their daily classroom work.

In the course of last year some two hundred and three cases were brought to the Bureau. Of these, fifteen went to trial. Fourteen were won and one was settled to avoid defeat. There is reason to believe that the usefulness of this organization will increase during the coming year.

THE STOPPING OF AMERICAN OIL SHIPS BY ENGLISH CRUISERS. — Fresh problems of international law arise almost daily as the European war progresses, — some of them of the utmost importance to the United States in the preservation of her neutrality. Recently three American vessels carrying oil to neutral ports were stopped by British cruisers.¹ Two of them had changed from German to American registry after the outbreak of hostilities. The exact facts in each incident have not at this writing been made public by our Department of State, but it is clear that whatever justification exists must have its basis in the nature of the cargo, the destination of the vessel, its registry, or its ownership. The matter is complicated by the imperfect success of the Declaration of London which codified the rules of international prize law, but which was never ratified by all the nations.²

¹ The boats referred to are the "Platuria," the "Brindilla," and the "John D. Rockefeller," operated by a German corporation in which the Standard Oil Company of New Jersey has the controlling interest. All were finally released.

² The Naval Conference of London met in 1908-09 to draft the rules of law which

Contraband of war may be either absolute or conditional. If absolute, it may be seized whenever destined for the belligerent country; but if conditional, it may be condemned only when actually bound for the military or naval authorities.³ Now illuminating oil such as made up the cargoes of these vessels is clearly not the sort of commodity to which the name "absolute contraband" is given; namely, that which like certain explosives is useful only in war, but comes if at all within the famous definition of Grotius that whatever is useful "both in war and out of war" is conditional contraband.⁴ In the Declaration of London fuel and lubricants are expressly named as conditional contraband,⁵ and under this or the preceding test illuminating oil must probably be included, although the case would be much stronger for a petroleum product which could be used for motive power.

If the cargo is conditional contraband the fact that the vessels were *en route* between neutral countries is not conclusively a guarantee of immunity. Early in the nineteenth century the prize courts of England and America adopted the so-called doctrine of continuous voyage under which condemnation is justified when it appears that the voyage to the neutral is merely a cloak to disguise an ultimate destination for the cargo among the military or naval stores of the belligerent.⁶ But this was by no means law universally, and the Declaration of London compromised by repudiating the doctrine of continuous voyage as applied to conditional contraband.⁷ While, of course, the Declaration of London was never ratified by England, the fact that the Conference came together at her request to settle among other things this very question, and that the compromise was accepted by her representatives at the Conference, makes it fair to say that she should proceed with extreme caution in the matter of interrupting trade in conditional contraband between neutrals.⁸ But apart from the Declaration of London, the doctrine of

should govern the new international prize court which the preceding Conference at The Hague had determined to establish. But since the Declaration of London was never finally adopted by either England or Germany, it is not binding. For a full report of and commentary upon the Conference, see the CORRESPONDENCE AND DOCUMENTS PRESENTED TO BOTH HOUSES OF PARLIAMENT BY COMMAND OF HIS MAJESTY, BRIT. BLUE BOOK, INTERNATIONAL NAVAL CONFERENCE MISC., No. 4 (1909), Cd. 4554. For the text of the Declaration in English, see 2 WESTLAKE, INT. LAW, 2 ed., p. 325. For the original French text, see 3 AMER. JOURN. INT. LAW (Supp.), 179.

³ See The *Peterhoff*, 5 Wall. (U. S.) 28, 58.

⁴ GROTIUS, DE JURE BELLI ET PACIS, Lib. III., c. 1, § 5. "*Sunt quæ et in bello et extra bellum usum habent.*"

⁵ DECLARATION OF LONDON, Art. 24.

⁶ The *William*, 5 C. Rob. 385. See Stephen Hart, 3 Wall. (U. S.) 559. Historically the doctrine was first applied to the distinct wrong of blockade running, but it was soon logically extended to the carriage of contraband. During the Civil War attention was focused to it by the illicit trade that was carried on with the Confederate States *via* the small island of Nassau just off the coast of Florida. Its origin and scope are ably discussed by Justice Elliott of the Supreme Court of Minnesota, in 1 AMER. JOURN. INT. LAW, 61. See also 24 HARV. L. REV. 167.

⁷ DECLARATION OF LONDON, Art. 35. See BRIT. BLUE BOOK MISC., No. 4 (1909), 49. See also 8 AMER. JOURN. INT. LAW, 317.

⁸ The instructions to His Majesty's representatives contained this sentence: "Any proposal tending in the direction of freeing neutral commerce and shipping from the interference which the suppression by belligerents of the trade in contraband involves, should receive your sympathetic consideration, and, if not otherwise open to objection, your active support." BRIT. BLUE BOOK MISC., No. 4 (1909), 23.

continuous voyage does not apply to these oil ships. There is little in the facts of the cases to indicate sufficiently actual complicity between the American shipper and the belligerent war department to warrant the holding up of presumptively neutral commerce. True, the objection that the ultimate destination is to be reached overland is specious, and opposed to the best recent authority.⁹ But here the oil is to be mixed with the common stock of the vendee country, and the responsibility for the subsequent forwarding must be upon that nation. It is submitted that the voyage is not in any sense continuous unless there is complicity between the shipper and the belligerent authorities.¹⁰

So far as can be learned, the British government has not raised the issue of changed registry in these particular episodes, but the war cannot long continue before situations will arise that call for a decision as to how far a transfer from a belligerent to the American flag will protect shipping. Unfortunately the law in this regard is not free from ambiguity, but it seems to be focusing toward the principle that any transfer, even though involving an absolute change of ownership, if made for the purpose of escaping the consequences of belligerency, is void. Some of the Anglo-American cases have limited their inquiry to the determination of whether in substance any element of belligerent control or interest remained in the vessel after the transfer,¹¹ while others base their decision on the rule that the sale must not have been inspired by a desire on the part of the vendor to avoid the hazards of war.¹² The Declaration of London adopts the view that the transfer is void if made to evade the consequences to which an enemy vessel is exposed,¹³—a result that was influenced no doubt by the fact that the law of France and Russia has always been unequivocal that no transfer whatever would be recognized after the outbreak of hostilities.¹⁴ Under this view it is considered no insult to the neutral flag to disregard the sale and condemn the ship, inasmuch as the fraudulent transfer has deprived the enemy of a fair means of exerting pressure on the belligerent. And as an eminent English authority has pointed out, the Declaration of London, although not obligatory, "carries a weight on the points determined in it which belongs to no private international code, and which cannot fail to exercise a great influence both on international practice and on international opin-

⁹ See 1 AMER. JOURN. INT. LAW, 97, 100.

¹⁰ So far as Denmark is concerned, towards which two of the ships were bound, it is not surprising that there has been a large increase in the importation of oil, inasmuch as the normal sources of supply in Russia and Roumania are now cut off. And to clinch the matter, it is said that Denmark has already assured England that she would rigidly enforce an embargo on contraband.

¹¹ The Benito Estenger, 176 U. S. 568; The Vigilantia, 1 C. Rob. 1; The Baltica, 11 Moore's P. C. 141.

¹² The Jan Frederick, 5 C. Rob. 128. Sir W. Scott says (p. 131), "This court has even allowed a change of property *in transitu*—where it had been done without any view of accommodation to relieve the seller from the pressure or prospect of war." The Minerva, 6 C. Rob. 396.

¹³ DECLARATION OF LONDON, Art. 56. See also Art. 55.

¹⁴ At the Naval Conference each nation presented a summary of the law as administered in her own prize courts. See PARLIAMENTARY PAPERS MISC., No. 5 (1909), France, 31; Russia, 56.

ion."¹⁵ But whatever view is taken as to the elements necessary in change of ownership, with the oil ships there was admittedly no change of ownership whatever. They are the property of a German company in which the controlling interest is American, and even if in name the American corporation should take them over it would be difficult to satisfy a prize court that the belligerent interest had been permanently divested. It was palpably a change of registry solely for the purpose of gaining immunity and without a *bonâ fide* cutting off of the German interest, and in either aspect the transfer is void. It is submitted that the same should be true even where the ownership has throughout been completely American. If our capital entrusts itself to the protection of a foreign flag in times of peace for the purpose of obtaining compensatory advantages, it must endure the risks which are incident to such protection when war breaks out.¹⁶ In regard to the belligerent ships which are now interned in some of our harbors, it must be borne in mind that nearly all of them have been subsidized by their respective foreign governments and are subject to conversion into auxiliary warships. They would therefore fall within the total disability of a foreign war vessel, the sale of which is always and under all circumstances void.¹⁷ And even for a strictly private ship the sale of which is absolute and *bonâ fide* as between the parties, it would be difficult to establish that the sale was not directly induced by a desire to put it out of the reach of the warring nation for which it was fair prize; and this, it is submitted, would violate the Declaration of London, and thus tend to jeopardize American neutrality.

THE EVOLUTION OF THE CONTINGENT REMAINDER. — The Committee on Legislation of the Massachusetts Bar Association has proposed an act which, if successful in earning legislative approval, will serve to exterminate whatever vestige of technicality inherent in contingent remainders is now surviving in that jurisdiction.¹

This eminently desirable result will have been centuries in attainment.² Originally, we are told, the creation of any unvested estate

¹⁵ 2 WESTLAKE, INT. LAW, 2 ed., 255, 256.

¹⁶ Cf. this issue of the REVIEW, p. 217. See also 2 WESTLAKE, INT. LAW, 2 ed., 169.

¹⁷ The English practice makes this exception. See PARLIAMENTARY PAPERS MISC., No. 5 (1909), 40. "*Si le navire est sous le contrôle d'un ennemi.*"

¹ The full text is to be found in the Report of the Committee on Legislation for 1914, p. 54. It is in part as follows: "A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner as it would have taken effect if it had been an executory devise, or a springing or shifting use, and shall, like such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." The act is accompanied by an admirable "Explanatory Note," which is altogether persuasive and concise.

² On the general subject of contingent remainders, springing and shifting uses, and executory devises, see FEARNE, CONTINGENT REMAINDERS, especially vol. 1, 317-415, 490-569; LEAKE, LAW OF PROPERTY IN LAND, 2 ed., 32-43, 233-246, 252-268; WILLIAMS, SEISIN OF THE FREEHOLD, 169-202; WILLIAMS, LAW OF REAL PROPERTY, 22 Eng. ed., 306-411, 17 Int. ed., 410-463; JARMAN ON WILLS, 6 Eng. ed., 1352-1460.

was illegal, but later certain unvested future property interests known as contingent remainders were recognized. They could not be conveyed, although they might be released or devised. Most important of all, a contingent remainder was liable to be lost through failure to vest before the determination, however occasioned, of the prior vested freehold estate.³ The operation of this rule involved hardship, and defeated the intent of the creator of the interest.⁴ With equitable estates, however, this result was not reached, as the outstanding legal title in a mortgagee,⁵ or trustee,⁶ satisfied the requirement of continuous seisin, the absence of which was the technical reason for not protecting contingent remainders at law. Moreover, after the Statute of Uses,⁷ springing and shifting uses became possible, and after the Statute of Wills,⁸ executory devises, both of which were independent of the rules respecting seisin, and were therefore indestructible regardless of what happened to the prior estate. There nevertheless prevailed a fixed rule to construe what might have been a use or devise as a contingent remainder wherever under the former law a contingent remainder would have been possible after the prior estate.⁹ Consequently, this potentiality for thwarting the intention of grantors and devisors continued as before.

Naturally, effort was made to eliminate the severe effects of the operation of these common-law principles. This has been accomplished in some instances by the court through strained construction of contingent, into vested, remainders,¹⁰ or by repudiating the entire doctrine;¹¹ but legislative action was necessary for effective reform. First of all, an act of Parliament enabled children *en ventre sa mère* to be considered as born for the purpose of taking an estate;¹² and this is generally law in this country.¹³ In 1836 Massachusetts ended the destruction of contingent remainders by the premature ending of the prior vested freehold estate.¹⁴ Nine years later England followed with a similar statute,¹⁵ which also provided for the alienation of contingent property interests by deed.¹⁶ The chance of destruction through failure to vest before

³ This determination might be premature, through forfeiture or surrender; or natural, by the prior estate running out.

⁴ Examples of the intent of testators being defeated by natural termination are *Festing v. Allen*, 12 M. & W. 279, and *White v. Summers*, [1908] 2 Ch. 256.

⁵ *Astley v. Micklethwait*, 15 Ch. Div. 59.

⁶ *Abbiss v. Burney*, 17 Ch. Div. 211.

⁷ STAT. 27 HEN. VIII., c. 10 (1535).

⁸ STAT. 32 HEN. VIII., c. 1 (1540).

⁹ *Doe d. Planner v. Scudamore*, 2 B. & P. 289, 298; *Crump v. Norwood*, 7 Taunt. 362.

¹⁰ See *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81, criticized in 16 HARV. L. REV. 307.

¹¹ *Kennard v. Kennard*, 63 N. H. 303; *Hayward v. Spaulding*, 75 N. H. 92, 71 Atl. 219, criticized in 22 HARV. L. REV. 388.

¹² STAT. 10 & 11 WM. III., c. 16 (1699), which had been preceded by *Reeve v. Long*, 3 Lev. 408.

¹³ See STIMSON, AMERICAN STATUTE LAW, § 1413.

¹⁴ MASS. R. L., c. 134, § 8.

¹⁵ REAL PROPERTY ACT, STAT. 8 & 9 VICT., c. 106 (1845). This act abolished tortious feoffment. Fines and recoveries had already been abolished by STAT. 3 & 4 WM. IV., c. 74 (1833).

¹⁶ *Winslow v. Goodwin*, 7 Met. 363, 377, shows such to have been the law in Massachusetts.

the natural termination of the preceding freehold, however, persisted until in 1877 Parliament provided against this result "in the event of the particular estate determining before the contingent remainder vests."¹⁷ While contingent remainders expressed to individuals are undoubtedly adequately covered, the act has been criticized as not thoroughly embracing those expressed to classes.¹⁸ The wording of the proposed Massachusetts law avoids this difficulty. Thus, where property is devised to A. for life, remainder to such of his children who attain twenty-one, and A. dies leaving six children, only two of whom are of age, under the English act the two will take to the exclusion of the others;¹⁹ but under the suggested Massachusetts enactment all may eventually take as the testator intended.

The proposed statute further establishes that contingent remainders shall be subject to no other rule concerning remoteness save the rule against perpetuities. This renders impossible in Massachusetts the confusion and indefiniteness ensuing from adopting a further rule forbidding a limitation to an unborn person for life with remainder to the issue of that person.²⁰ While this provision may be merely declaratory of existing legal principles in that state,²¹ it nevertheless is desirable that the law on this point be properly and definitively settled, at the same time avoiding both uncertainty while awaiting judicial decision, and the attendant, and not altogether negligible, risk that the technical English rule might be accepted.

The bill which is to be submitted to the Massachusetts legislature is accordingly worthy of unreserved support. When rules, which are at best but arbitrary and technical historical survivals, not only serve no useful purpose, but by their very existence jeopardize the successful disposition of property, the time for their abolition has come. Their existence until this late day is attributable solely to inertia.²²

APPLICATION OF THE RULE IN CLAYTON'S CASE TO THE DISTRIBUTION OF PROPERTY HELD UNDER CONSTRUCTIVE AND RESULTING TRUSTS. — It is refreshing to find a recent English case which declines to apply

¹⁷ LAW ON CONTINGENT REMAINDERS, STAT. 40 & 41 VICT., c. 33.

¹⁸ WILLIAMS, SEISIN OF THE FREEHOLD, 205.

¹⁹ For operation of the rule prior to the statute see *Breckenbury v. Gibbons*, L. R. 2 Ch. Div. 417; *Symes v. Symes*, [1896] 1 Ch. 272.

²⁰ *Whitby v. Mitchell*, 42 Ch. Div. 494, 44 Ch. Div. 85; extended to equitable estates in *In re Nash*, [1901] 1 Ch. 1; and unsoundly followed in *In re Park's Settlement*, [1914] 1 Ch. 595, which was criticized in 27 HARV. L. REV. 752 and 30 L. QUART. REV. 134, 353. See WILLIAMS, LAW OF REAL PROPERTY, 22 Eng. ed., 420, 17 Int. ed., 470.

²¹ There has been no Massachusetts adjudication. But see GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 284 *et seq.*; also 16 HARV. L. REV. 294.

²² For American statutory changes up to 1886 see STIMSON, AMERICAN STATUTE LAW, § 1426. See ALA. CODE (1907), § 3398; ARIZ. CIVIL CODE (1913), § 4692; GA. CODE (1911), § 3675; KY. STATUTES (1909), § 2346; HOWELL'S MICH. STATUTES (1913), §§ 10654-6; MINN. GENERAL STATUTES (1913), § 6684; N. Y. CONSOLIDATED LAWS (1909), ch. 52, § 58; N. DAK. REVISED CODE (1905), § 4778; S. DAK. COMPILED LAWS (1913), § 258; VA. ANNOTATED CODE (1904), § 2424; W. VA. CODE (1906), § 3031; WIS. STATUTES (1911), § 2058.

the rule in *Clayton's Case*¹ as a blind mechanical rule of thumb with a stern disregard of the justice of any particular result. *In re British Red Cross Balkan Fund*, [1914] 2 Ch. 419.² According to this rule, where there is a running account between two parties, and the debtor makes a payment thereon, if neither he nor the creditor at the time of payment specifies what debt it is applied to, the payment is presumed to be in satisfaction of the debts which earliest accrued.³ Like other rules of presumption,⁴ it is a highly specialized tool in the judicial workshop, admirably fitted to one peculiar angle of our law, but likely to botch the job when used in another situation.

Legitimately applied, the rule fairly determines the relations of the parties *inter se* in accordance with accounting methods and business custom. Thus, suppose a depositor puts \$100 into a bank, later adds another \$100, and then draws out \$100. In a contest between bank and depositor, turning upon the question which deposit had been withdrawn, the rule in *Clayton's Case* applies, and the presumption is that it was the first deposit. Feeling constrained by this analogy, the courts formerly held that if a trustee deposits \$100 belonging to his *cestui*, later adds \$100 of his own, and then withdraws \$100, which is dissipated, the *cestui* had no rights against the fund remaining on deposit.⁵ But now the *cestui* is given a right against the balance, which right is generally based on the fiction that the wrongdoer is presumed to withdraw his own money first.⁶

The courts have not yet discarded the rule as a measure of the *cestuis'* rights, in a case where the trustee commingles the money of two *cestuis* in one bank account, without adding any of his own. Thus, if a trustee for A. and B. deposits \$100 of A.'s, later adds \$100 of B.'s, and then withdraws \$100, which he dissipates, B. may claim the entire balance.⁷ The courts cannot extricate themselves from this position by any fictitious presumption of the trustee's intent in making the withdrawal, as was done where the trustee's own money was mingled with the *cestui's*. But an equity for the *cestuis* in both cases may be worked out on scientific principles without resort to a fiction. Two rights are open to the *cestui*.⁸ First, he may claim an equitable lien upon the trustee's entire *chose in action* against the bank for the amount of the trust funds wrongfully deposited. Secondly, the injured *cestui* may claim that the depositor is holding in constructive trust a part of his *chose in action* against the bank pro-

¹ 1 Mer. 572, 608.

² A statement of the case appears in RECENT CASES, p. 216.

³ For a general discussion showing the place which the rule in *Clayton's Case* occupies in the law of appropriation of payment, see 21 HARV. L. REV. 623; 3 AM. LAW REG. 705; 1 AM. LAW MAG. 31; 1 AM. LEAD. CAS. 339.

⁴ Cf. the comment of Maule, J., on the presumption that every person knows the law, in *Martindale v. Falkner*, 2 C. B. 706, 719.

⁵ *Pennell v. Deffell*, 4 DeG., M. & G. 372; *Brown v. Adams*, L. R. 4 Ch. 764.

⁶ *Knatchbull v. Hallett*, 13 Ch. D. 696, 726; *In re A. O. Brown & Co.*, 189 Fed. 432.

⁷ *In re Stenning*, [1895] 2 Ch. 433; *Empire State Surety Co. v. Carroll County*, 194 Fed. 593.

⁸ For a fuller development of these theories, citing authorities, see an article by Prof. Austin W. Scott, entitled "Money Wrongfully Mingled with Other Money," 27 HARV. L. REV. 125.

portionate to the *cestui's* contribution to the entire deposit. Where a *cestui* whose money has been mingled with the trustee's pursues one of these remedies, the trustee should not be allowed to set up *Clayton's Case* in defense. Even an *actual* intent to destroy the remedies by making withdrawals should be ineffective;⁹ and clearly the law should not manufacture a presumed intent more potent than the actual intent of a wrongdoer. If only the *cestuis'* money has been commingled, without the addition of any money of the trustee's, the *cestuis* are, in substance, on either the lien or constructive trust theory, co-owners of the claim against the bank. Increases in value are divided equally between them,¹⁰ and similarly wrongful withdrawals should be charged against them equally.

In the recent English case referred to, the money of many subscribers to a fund was mingled, and withdrawals were made by the trustee in legitimate pursuance of the trust. When, the purpose of the express trust failing, it became necessary to determine the beneficiaries of the resulting trust,¹¹ the court directed a distribution *pro rata* among all the subscribers, instead of paying the last contributors in full. Thus the courts say, where the trustee's withdrawal from commingled trust funds is wrongful, *Clayton's Case* is applied; where the withdrawal is authorized, *Clayton's Case* is not applied. Two situations of interest were not before the court in this case. Suppose the money of one subscriber was expended before any other subscriptions were mingled with it. It is submitted that he would have no claim to a share in the unexpended balance. His right is defeated, not by the operation of the rule in *Clayton's Case*, but by the fact that his money could actually be identified as that which was withdrawn. Secondly, suppose the money of any subscriber is accepted after the purpose of the trust has failed. From the moment the money is received, it is subject to a resulting trust in favor of the subscriber. It is submitted that his interest as a beneficiary to the full extent of his contribution should not be diminished by the mingling of his money with the other funds.

For the subscribers who stand between these two extremes the principal case establishes an equitable rule. They have an inchoate right by way of resulting trust to all that remains if the express trust fails. This remotely contingent interest should be regarded as ownership in common, and hence a decrease in the value of the whole should be distributed *pro rata* among them.¹² To apply the rule in *Clayton's Case* would seem wholly unjustifiable. As there is no rational distinction between this case and the situation where the trustee's withdrawal is wrongful, it may not be over sanguine to hope that the rule in *Clayton's Case* will no longer be erroneously applied in the latter situation.

⁹ Subject, of course, to the nature of the right. Thus the lien remedy can never be worth more than the total amount on deposit.

¹⁰ Lord Provost v. Lord Advocate, 4 App. Cas. 823.

¹¹ *In re* Trusts of Abbott Fund, [1900] 2 Ch. 326; *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17.

¹² Cf. *In re* Printers' Trade Protection Society, [1899] 2 Ch. 184; and *In re* Trusts of Abbott Fund, *supra*.

THE DOMICILE OF A WIFE. — The old saying that a husband and wife are one, and the husband that one, has to-day no more foundation in law than in fact. By almost universal statutes, the wife may contract, receive and convey property, sue and be sued, just as though unmarried;¹ she may keep her earnings, and sue for them in her own name;² she may contract with her husband,³ and in most states even prosecute actions against him.⁴ This recognition of the wife as a distinct legal entity reaches its culmination in a recent New York decision where a wife had lived apart from her husband for twenty-six years. No decree of separation had been procured, nor were grounds therefor shown. Yet it was held in administering her estate that the wife had acquired a separate domicile. *In re Crosby's Estate*, 85 Misc. (N. Y.) 679 (Surr. Ct., N. Y. County).⁵

By entering the marriage relation, the parties signify their intent to live together and produce children.⁶ The law accordingly imposes upon them the mutual duty of cohabitation.⁷ Thus the whole theory of the marital relation involves the idea of a single home;⁸ and the husband, as the traditional head of the family, and the one primarily⁹ liable for its support, ordinarily selects that home.¹⁰ Under normal circumstances, therefore, the husband's domicile determines that of the wife, because her home in fact follows his. However, she is now everywhere allowed to have a separate domicile under some circumstances. The English courts, chafing under the strict common-law rule, are gradually, on one ground or another, conceding this right to the wife.¹¹ The prevailing American doctrine is that where she has grounds for divorce, she may establish a separate domicile anywhere for the purpose of bringing divorce proceedings.¹² Under like circumstances, the United States Supreme

¹ *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. 534; see STIMSON, AMER. STAT. LAW, §§ 6482, 6450, 6453, 6454.

² *Jordan v. Middlesex R. Co.*, 138 Mass. 425; *Harmon v. Old Colony R. Co.*, 165 Mass. 100, 42 N. E. 505; *Brooks v. Schwerin*, 54 N. Y. 343; see STIMSON, AMER. STAT. LAW, §§ 6520, 6522.

³ *Morrison v. Brown*, 84 Me. 82, 24 Atl. 672; *Winter v. Winter*, 191 N. Y. 462, 84 N. E. 382; see STIMSON, AMER. STAT. LAW, § 6480.

⁴ *Wilson v. Wilson*, 36 Cal. 447; *Wood v. Wood*, 83 N. Y. 575; see 28 HARV. L. REV. 109. For a history of legislation in regard to married women, see 6 So. L. REV. 649-662.

⁵ Following a previous decision in the same jurisdiction, *Matter of Florance*, 54 Hun (N. Y.) 328. For a statement of the case, see RECENT CASES, p. 207. Accord, *Shute v. Sargent*, 67 N. H. 305.

⁶ STEWART, MAT. & DIV., §§ 84, 173; STEWART, HUSB. & WIFE, § 59; TIFFANY, PERSONS, § 31.

⁷ While this duty cannot be specifically enforced in the United States, STEWART, HUSB. & WIFE, § 72; 1 BISHOP, MAR., DIV., & SEP., § 69; TIFFANY, PERSONS, § 31; yet it is given legal recognition. *Barnes v. Allen*, 30 Barb. (N. Y.) 663; *Westlake v. Westlake*, 34 Oh. St. 621; *Roberts v. Faisby*, 38 Tex. 219.

⁸ "Established by the husband, and cared for by the wife, where the two shall dwell together." *Gordon v. Yost*, 140 Fed. 79, 80; see also *Warrender v. Warrender*, 9 Bligh. 89, 117.

⁹ The wife may also be liable. See STIMSON, AMER. STAT. LAW, § 6410.

¹⁰ But there may well be instances where the wife in fact does the selecting. See *Birney v. Wheaton*, 2 How. Pr. N. S. 519.

¹¹ *Deck v. Deck*, 2 Sw. & Tr. 90; *Niboyet v. Niboyet*, 4 P. D. 1; *Stathatos v. Stathatos*, [1913] P. D. 46. See for a discussion of this last case, 26 HARV. L. REV. 447.

¹² *Ditson v. Ditson*, 4 R. I. 78; *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Champon*

Court has allowed her a separate domicile for purposes other than divorce.¹³ Thus the only qualification on the wife's absolute right to acquire a separate domicile has come to be at the most that she must not without cause be living apart from her husband.

To acquire a separate domicile, she must intend to abandon her husband's home, and set up an independent home of her own.¹⁴ It is true that when she has no cause for separation such an intent is inconsistent with her legal obligation to make her home with her husband. But this inconsistency is not *per se* sufficient to prevent her acquiring such a domicile. It is perfectly possible for one to acquire a domicile in a place where he is forbidden by law to take up a permanent abode.¹⁵ It might be urged that when her legal duty is to make her home with her husband, since domicile is a question of legal home, her domicile remains the same as his. But domicile is usually a legal conclusion based upon facts, and a fiction is used only when there is no home in fact, or where the person making the home is not *sui juris*, as in the case of an infant or lunatic. The wife can undoubtedly be physically present at the home. The only reason therefore for arbitrarily forcing the husband's domicile upon her must be that she is not sufficiently *sui juris* to be capable of acquiring a separate home. To be sure, the fact that the fiction of identity has been destroyed might not alone give her such power. But by judicial construction of modern statutes she may have legal possession independent of,¹⁶ and even adverse to,¹⁷ her husband. In other words, not only has she an identity, but she is *sui juris* in that identity. When she in fact obtains a separate home which by law she may now hold in her own right and not for her husband, it is submitted that domicile must be decided upon these facts and not by any fiction.

Undoubtedly, the gravest policy of the law is to preserve the integrity of the home; and consequently the rule of the New York court should not be adopted if it in any way tended to controvert this policy.¹⁸ But looking at the matter in a common-sense way, it can hardly be supposed that rules as to domicile will have any deterrent effect if the wife in fact wants to leave her husband though without sufficient cause.¹⁹ More-

v. Champon, 40 La. Ann. 28, 3 So. 397; Tolen v. Tolen, 2 Blackf. (Ind.) 407; Hardin v. Alden, 9 Greenl. (Me.) 140. See MINER, CONFLICT OF LAWS, § 50. Massachusetts courts would probably allow the wife only to retain the last matrimonial domicile. See Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740.

¹³ Williamson v. Osenton, 232 U. S. 619. Accord, Watertown v. Greaves, 112 Fed. 183; Gordon v. Yost, *supra*. See Champon v. Champon, *supra*, at p. 31.

¹⁴ DICEY, CONFLICT OF LAWS, 114; Jopp v. Wood, 4 DeG., J. & S. 616; Urquhart v. Butterfield, 37 Ch. D. 357.

¹⁵ Attorney-General v. Pottinger, 6 H. & N. 733; Young v. Pollack, 85 Ala. 439, 5 So. 279; see Hodgson v. De Beauchesne, 12 Moore's P. C. 285.

¹⁶ Stanley v. National Union Bank, 115 N. Y. 122; Mygatt v. Coe, 147 N. Y. 456, 42 N. E. 17.

¹⁷ Hartman v. Nettles, 64 Miss. 495, 8 So. 234; Warr v. Horneck, 8 Utah, 61, 29 Pac. 1117; Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313.

¹⁸ Under modern social conditions, diverse interests of husbands and wives probably often compel them to live apart. Such an arrangement may be perfectly consistent with the integrity of the home.

¹⁹ Nor would her leaving her husband be necessarily a hardship on him. He no longer has the duty to support her. Constable v. Rosener, 82 N. Y. App. Div. 155, 81 N. Y. Supp. 376; Ogle v. Dersham, 91 N. Y. App. Div. 551, 86 N. Y. Supp. 1101.

over, the ancient conception of the wife as a being incapable of caring for herself has been entirely overthrown by modern legislation; and the sphere of woman in the world to-day certainly entitles her to a position in the law in every way on a par with man.

THE RIGHT TO A HEARING BEFORE ADMINISTRATIVE TRIBUNALS. — The remarkable development of administrative law within the past few decades, and the extent to which bodies primarily executive in character have supplanted the courts in the exercise of many functions formerly conceived to be of solely judicial nature are phenomena so familiar that comment is rendered trite.¹ Nevertheless the law of the subject is apparently still in its infancy,² and this is particularly true of that part dealing with procedure. Doubtless freedom from procedural shackles is one of the chief ends sought in tribunals created in response to a demand arising out of the inefficiency of our traditional judicial procedure.³ But some limitation must be imposed upon the exercise of executive discretion in the conduct of quasi-judicial inquiries. In this country this limitation has been furnished by the express requirements of "due process of law" in federal and state constitutions. English tribunals not proceeding according to express authority of the supreme Parliament have also always been held within similar limits.⁴

In general, where deprivation of liberty or property is involved, the essentials of due process of law on both sides of the Atlantic are notice and hearing.⁵ One familiar exception to this is found in those cases where the immediate exigencies of police protection sanction summary deprivation of property without any hearing whatsoever.⁶ Summary imposition of penalties for violation of immigration laws has also been justified as a condition imposed upon a privilege which might be denied altogether.⁷ But it is well settled that the mere fact that administrative officials are invested with powers involving deprivation of property in their exercise, does not justify such deprivation upon mere official fiat, without hearing.⁸ The formal procedure of purely judicial

¹ For an account of the extent of this development, see an article by Roscoe Pound, entitled "Executive Justice," 55 AM. L. REG. 137.

² WYMAN, ADMINISTRATIVE LAW, § 112.

³ For an explanation of the development of quasi-judicial administrative boards, see 55 AM. L. REG. (*supra*), p. 144 *et seq.*

⁴ MAGNA CHARTA, cap. 39; Clark's Case, 5 Coke, 64a; COKE, 2 INST. 45 *et seq.* See McGEHEE, DUE PROCESS OF LAW, pp. 24-26, and cases cited in note 5, *infra*.

⁵ McGEHEE, DUE PROCESS OF LAW, pp. 73-75; Bagg's Case, 11 Coke, 99 a; The King v. The University of Cambridge, 8 Mod. 148; Painter v. Liverpool Gas Co., 3 Ad. & El. 433; Stewart v. Palmer, 74 N. Y. 183; Londoner v. Denver, 210 U. S. 373; and see Simon v. Craft, 182 U. S. 427, 436; Louisville, etc. R. Co. v. Schmidt, 177 U. S. 230, 236; Bonaker v. Evans, 16 Q. B. 162, 174.

⁶ North American Cold Storage Co. v. Chicago, 211 U. S. 306; Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344; Lawton v. Steele, 152 U. S. 133.

⁷ Such is the reasoning of the court in Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320. It is perhaps sufficient when supported by the strong presumption to be indulged in favor of the constitutionality of legislative enactments.

⁸ Londoner v. Denver, *supra*; Stewart v. Palmer, *supra*; see Board of Education v. Rice, [1911] A. C. 179, 182; The King v. Local Government Board, [1911] 2 Ir. Rep. 331, 344.

tribunals,⁹ however, is not required. But how summary such executive hearing may be, is nowhere clearly defined.

A recent decision of the House of Lords finds no denial of due process in the refusal to permit a litigant before the Local Government Board on the question of the proper condition of a tenement house to learn the evidence adduced by his adversary. *Local Government Board v. Arlidge*, Weekly Notes, No. 30, p. 328.¹⁰ It does not seem that the case can be assimilated to the cases involving imperative necessity for an immediate exercise of the police power, since remedial action had already been taken, and the only result of delay was continuation of the *status quo*.¹¹ It therefore seems contrary to the unanimous American authority, which emphatically asserts the right of a litigant at any such hearing to be fully apprised of all evidentiary matter adduced by the adverse party;¹² "for in no other way can a party maintain its rights or make its defense."¹³ These cases differ from the principal case only in that the questions in dispute involved much more complex facts. It is true that the hearing requisite in any particular case may be made to depend to some extent on the relative complexity of the issues generally encountered in cases of that class, and where the legislature has prescribed a certain sort of hearing the courts will hesitate to declare it unreasonable on account of the hardships of a particular case.¹⁴ The question of the condition of a tenement house might, therefore, require a much less elaborate hearing than is necessary before the Interstate Commerce Commission. But the gulf between a hearing which includes knowledge of adverse evidence and one which does not, seems almost as broad as between one of the latter sort and none whatsoever — a gulf too broad to be spanned, no matter how simple is the question for determination. Entire absence of precedent permitting such procedure affords strong indication that it has rarely, if ever, been practised. On the other hand, history contains at least one famous instance in which such procedure was condemned in striking manner by laymen.¹⁵

⁹ See WYMAN, ADMINISTRATIVE LAW, § 119; *Londoner v. Denver*, *supra*, p. 386; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Cincinnati, etc. Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 149.

¹⁰ Although Parliament had left procedure to the discretion of the Board, it would violate principles of statutory construction long well settled to interpret general words as abolishing the requirement of due process. "When some collateral matter arises out of general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it." 1 BL. COM. 91.

¹¹ For a description of the procedure, see this issue of the REVIEW, p. 207. For a complete account, see the reports of the case in the lower courts; *Rex v. Local Government Board*, *Ex parte Arlidge*, [1913] 1 K. B. 463; on appeal, [1914] 1 K. B. 160.

¹² *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693; *Interstate Commerce Commission v. Louisville, etc. Ry.*, 227 U. S. 88, 93.

¹³ *Lamar, J.*, in *Interstate Commerce Commission v. Louisville, etc. Ry.*, *supra*, at p. 93.

¹⁴ See *Bellingham, B. & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 319.

¹⁵ Speaking of the abolition of the star chamber because of its oppressions: "The most arbitrary proceedings of the star chamber were based upon the evidence — if not of written papers of a private nature or of common rumor — at best of spies and informers, who were not confronted with the prisoner whom their charges were to condemn." MEDLEY, ENGLISH CONSTITUTIONAL HISTORY, 3 ed., p. 448.

From the standpoint of pure administrative efficiency there is much to be said in favor of the House of Lords' decision. Summary investigations would expedite the enforcement of the law where thousands of buildings must be inspected and perhaps condemned. But these advantages are overbalanced by the dangers of establishing a precedent that one may be deprived of property by what might become arbitrary executive authority upon evidence he has not seen and cannot know how to answer.

AEROPLANES AND ADMIRALTY. — It is probable that few lawyers have ever considered the possibility of bringing a libel in admiralty to enforce a lien for repairs to an aeroplane, and indeed the daring originality of such a suggestion makes it smack more of the "Highwayman's Case"¹ or the "Widow's Bill of Peace"² than a serious legal discussion. However, after an aeroplane had fallen in navigable waters of Puget Sound, such a libel was actually brought in a federal District Court. The court, of course, held that it had no jurisdiction in the matter. *The Crawford Bros.*, No. 2, 215 Fed. 269. There are certain considerations which lend a measure of superficial plausibility to the contention that an aeroplane might be made subject to a maritime lien for repairs. Admiralty jurisdiction has been greatly extended in the past. In America it has been extended to all navigable waters, and everywhere scientific progress has rendered logical and necessary the inclusion of many kinds of vessels, such as the steamboat and the submarine, unheard of until the nineteenth century.³ Furthermore, it seems feasible to apply many rules governing navigation of water to travel in the air. This is evinced by the fact that the code recommended by the International Juridic Committee on Aviation⁴ is very similar to admiralty law in many respects. Nevertheless, it is perfectly clear that in the absence of legislation, only courts of general jurisdiction can entertain such a case as this.

The nearest approach to authority for the plaintiff's contention is a *dictum* that salvage might be awarded for salvaging goods dropped into the sea from a balloon.⁵ This case, and the idea it advanced, that the law of salvage applied to objects found floating in the sea that were not ships or vessels, and had not been removed from ships or vessels at sea, was severely criticized in England,⁶ although the question has been left open by the United States Supreme Court.⁷ But whatever may be the law as to salvage, in general it is settled beyond question that admiralty jurisdiction can be attached only to craft capable of

¹ 2 POTHIER, OBLIGATIONS (Evans, notes), p. 6, n. In this case a highwayman petitioned for an accounting of partnership proceeds obtained by robbery.

² 11 Hare 371, n. In this case a bill was brought to avoid multiplicity of suits by joining five hundred defendants who owed various debts to the plaintiff's deceased husband.

³ An argument from this was pressed in the principal case.

⁴ See LAW NOTES (April, 1914), p. 5.

⁵ See Fifty Thousand Feet of Timber, 2 Lowell 64, 65.

⁶ See The Gas Float Whitton, No. 2, [1896] P. 42, 61.

⁷ See *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 630.

being used as a means of travel or transportation by water, or their cargoes,⁸ and there appears to be no decided case in which a maritime lien for repairs has been enforced against an object of any other description. It is a very nice question whether a hydro-aeroplane may not fall within this rule, but there is nothing to indicate that the machine in the principal case was anything other than an ordinary aeroplane.

THE PROPER SCOPE OF THE DOCTRINE OF EQUITABLE SERVITUDES.

— Since the time when Lord Cottenham created an equitable appendix to the law of servitudes,¹ the question as to the nature of these rights and the limits within which they should be enforced has been a vexing one. This extension of the law resulted from the narrow legal rules governing covenants running with the land and easements. In order that the burden may run with the land at law, in England the covenant must be between a lessor and lessee or their assignees,² to fulfill the requirement that there be privity of estate between the covenanting parties.³ In some of the United States covenants have also been allowed to run when the covenantee's owning an easement in the covenantor's land constitutes the only privity of estate.⁴ The law of easements was also strict. Not only was appurtenancy to a dominant tenement required,⁵ except in a few states,⁶ but also, from the principle that easements must not create rights of an unusual or capricious character,⁷ the kinds of easements became limited, and with a few exceptions were not recognized in the case of negative restrictions on the servient tenement.⁸

The cases in which equity first enforced restrictive agreements did not purport to add to the law of easements and covenants, but based their relief on the principle that it was inequitable, because of unjust enrichment, for a person who had notice to take property free from a restrictive contract which the owner had made concerning its use.⁹

⁸ The Big Jim, 61 Fed. 503. See authorities cited in The Starbuck, 61 Fed. 502, and AMES, CASES ON ADMIRALTY, 75, n. Flotsam, jetsam, and ligan must of course be embraced in the term "cargo" to render the above statement accurate.

¹ Tulk v. Moxhay, 2 Ph. 774.

² STAT. 32 HEN. VIII., c. 34, enlarged the common-law rules which had allowed only the assignee of the lessee to sue and be sued.

³ Keppell v. Bailey, 2 My. & K. 517; Austerberry v. Corporation of Oldham, 29 Ch. Div. 750, 781.

⁴ Morse v. Aldrich, 36 Mass. 449.

⁵ Rangeley v. Midland Ry., L. R. 3 Ch. 310; see also Ackroyd v. Smith, 10 C. B. 164.

⁶ Goodrich v. Burbank, 94 Mass. 459.

⁷ Per Lord Brougham, Keppell v. Bailey, *supra*, at 534; Hill v. Tupper, 2 H. & C. 121. See GALE, EASEMENTS, 8 ed., ch. 3, for a compilation of the various kinds of easements allowed at law in England.

⁸ GALE, EASEMENTS, p. 24, names only three negative easements which are recognized in England, *i. e.*, easements for light and air, for support of neighboring soil, and to receive the flow of water in an artificial stream.

⁹ Tulk v. Moxhay, *supra*; Haywood v. Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403. In Hall v. Ewin, 37 Ch. Div. 74, 79, Colton, L. J., said, "If a man buys land subject to a restrictive covenant, he regulates the price accordingly," and concludes that it would be unfair to let him now have the land unrestricted. Dean Ames supported this view. AMES, LECTURES ON LEGAL HISTORY, p. 385.

This was really arguing in a circle, for the vendor would sell at less than the full price only if the law were that the vendee did not take free of restrictions. Furthermore, there are no cases refusing to bind the vendee because he in fact made no profit. This vague explanation, therefore, gave no limits to the extent of the doctrine. The first hint of a more definite standard came when Sir George Jessel perceived that *Tulk v. Moxhay*¹⁰ was really an extension in equity either of covenants running with the land or of negative easements.¹¹ The latter analogy seemed triumphant when dominant and servient tenements in regard to which the restriction might apply, were held necessary.¹²

If equitable servitudes are, then, an addition to the law of easements, what must be the nature of the dominant estate to which they attach? At law one incorporeal estate might be appurtenant to another.¹³ There is authority to the effect that an easement can be appurtenant to a profit,¹⁴ or to another easement.¹⁵ In equity the necessity of a dominant tenement is at least as easily complied with as it is at law. The courts have allowed equitable servitudes to attach to one chattel for the benefit of another chattel,¹⁶ and have even allowed a servitude to attach to one business in favor of another business.¹⁷

In a recent case the English Court of Appeal seems to have taken a stricter view as to the characteristics necessary to constitute a dominant tenement. *London County Council v. Allen*, [1914] 3 K. B. 642.¹⁸ A landowner agreed with the London County Council not to build on property which the Council wished to use later for street purposes, at the end of a street they were then opening. It was admitted that under the English law the covenant would not run at law,¹⁹ and the court denied that it attached in equity, on the ground that there was no dominant tenement. The possibility that the public right in the streets might be a sufficient dominant estate was not considered, although this right is usually termed an easement;²⁰ and even authority which doubts this terminology does not suggest that the interest of the public is not

¹⁰ *Supra*, n. 1.

¹¹ *London, etc. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 583.

¹² *Formby v. Barker*, [1903] 2 Ch. 539; see *Peck v. Conway*, 119 Mass. 546; *Webb v. Rollins*, 77 Ala. 176, 183.

¹³ *Co. Litt.*, 121 b, n. 7 (H. & B.'s ed.). "A thing incorporeal can be appurtenant to another thing incorporeal, the test being whether they are capable of union without incongruity."

¹⁴ See *Hanbury v. Jenkins*, [1901] 2 Ch. 401, 422.

¹⁵ *GALE, EASEMENTS*, 8 ed., p. 12; see Lord Alverstone's test in *Attorney-General v. Copeland*, [1901] 2 K. B. 101.

¹⁶ *Murphy v. Christian Press Association*, 38 N. Y. App. Div. 426, 56 N. Y. Supp. 597; *Henry v. Dick Co.*, 224 U. S. 1.

¹⁷ *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980; *Fleckenstein v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1020; *Catt v. Tourle*, L. R. 4 Ch. 654; *Luker v. Dennis*, 7 Ch. Div. 227.

¹⁸ For a more complete statement of the facts of this case, see this issue of the *REVIEW*, p. 213.

¹⁹ This admission would not be necessary in those American states allowing a covenant in aid of an easement to run at law. See n. 4, *supra*.

²⁰ *Dovaston v. Payne*, 2 H. Bl. 527; *St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47, 54; see 1 *ELLIOTT, ROADS AND STREETS*, § 255.

a true property right.²¹ It is therefore submitted that this restriction attached to the benefit of the public user in the streets, and that the London County Council in charge of such public interests was the proper body to enforce it.²²

The court failed to recognize this, and Scrutton, J., regretting the result to which he felt himself forced, suggests that the present rule is over narrow, and that it would be of advantage to go back to the old doctrine of unjust enrichment, which is, as we have seen, no test at all. This result is unnecessary if the courts are sufficiently liberal in their test of a dominant estate. In this way a more workable standard is obtained and one by which equity may properly carry out Lord Cottenham's attempt to add to the narrow limits of easements at law.

RECENT CASES

ADMIRALTY — JURISDICTION — AEROPLANE FALLEN IN NAVIGABLE WATERS. — An aeroplane fell in navigable waters of Puget Sound. A libel was brought in admiralty to enforce a lien for repairs. *Held*, that the court had no jurisdiction. *The Crawford Bros., No. 2*, 215 Fed. 269. (Dist. Ct., W. D. Wash.)

For a comment on this extraordinary attempt at the extension of admiralty jurisdiction, see NOTES, p. 200.

BANKRUPTCY — PREFERENCES — INTENT OF DEBTOR: IMPORTANCE OF MOTIVE. — A debtor sent his creditor a check in the ordinary course of business. The creditor failed to cash the check and five days later learned of the debtor's insolvency. Not having the original check with him, the creditor then obtained from the debtor a duplicate check, which he cashed. Both parties at this time had full knowledge of the insolvency. *Held*, that this transaction is not a voidable preference under the Irish Bankruptcy Act. *In re Oliver*, [1914] 2 Ir. K. B. 356 (C. A.).

The narrow construction given the words "with a view of giving a preference" in the English bankruptcy law has confined the English law in regard to preferences within narrow limits. For a transfer made by a debtor with knowledge that it will prefer a creditor is not deemed a preference unless that was the debtor's dominant motive. *In re Eaton*, [1897] 2 Q. B. 16. Accordingly, if the debtor's motive is to perform a supposed legal duty, or if the payment is made because of pressure from a creditor, the transfer is not regarded as pref-

²¹ GALE, EASEMENTS, p. 15, doubts whether the right of user of the people in a street is an easement because there is no dominant tenement.

²² *Coverdale v. Charlton*, 4 Q. B. D. 104, shows the ordinary operation of this rule. The court denies that the Council in the principal case has any estate or interest in the land (p. 553), citing §§ 7 and 9 of the London Building Act, 1894; but the statute referred to says nothing on that question, merely detailing the method by which the Council might accept the dedication of new streets to the public's use. STAT. 51-52 VICT., ch. 41, pt. 2, § 4, gives certain powers to the County Council, to the sewer inspector, and to the borough councils as to the repair and management of the London streets. It is not entirely clear from these acts by which body the property interest of the people is held, but it would seem from a reading of the provisions that the County Council was in control. Even if the County Council were vested with only part of this interest, it would seem that the court should have recognized this part interest as sufficient to give the Council power to act.

erential. *In re Tweedale*, [1892] 2 Q. B. 216; *Van Casteel v. Booker*, 2 Ex. 691. Under such a doctrine, the principal case may be supported, since no actual desire to prefer was found. In this country, however, a more satisfactory doctrine prevails, and the opposite result would certainly be reached under the National Bankruptcy Act of 1898, § 60 *b*, especially as amended by the Act of 1910, which avoids a transfer if the person receiving it has reasonable cause to believe that it would effect a preference. Here the debtor's motive is immaterial. *In re Herman*, 207 Fed. 594. Motive, as distinguished from intent, would be equally unimportant in finding the "intent to prefer" necessary to make a preference an act of bankruptcy. BANKRUPTCY ACT OF 1898, § 3 *a* (2). *In re McGee*, 105 Fed. 895. The fact that the original check in the principal case was received without knowledge of any insolvency is immaterial. For the payment of the check and not the giving of it constitutes the preference. *In re Lyon*, 121 Fed. 723.

BANKRUPTCY — PREFERENCES — NECESSITY OF INTENT TO PREFER UNDER NATIONAL BANKRUPTCY ACT: EFFECT OF AMENDMENT OF 1910. — A company transferred certain assets to the defendant, a creditor, within four months prior to the institution of bankruptcy proceedings. Its trustee in bankruptcy now sues to set aside this transfer. The lower court omitted to charge that the transfer would be voidable if the defendant had reasonable cause to believe that it would effect a preference. *Held*, that such omission is error. *Soule v. First National Bank of Ashton*, 140 Pac. 1098, 32 Am. B. R. 536 (Ida.).

Before the 1910 amendment the federal bankruptcy law provided that to render a preference voidable, the person receiving it must "have had reasonable cause to believe that it was intended thereby to give a preference." BANKRUPTCY ACT OF 1898, § 60 *b*; 1903, § 13 *b*. This language was construed by the courts to imply that the debtor must intend a preference. *Kimmerle v. Farr*, 189 Fed. 295; *Hardy v. Gray*, 144 Fed. 922. *Contra*, *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999. But the cases did not determine definitely whether this intent could be inferred from the natural and probable results of the debtor's act. *Hardy v. Gray*, *supra*. *Cf. Alexander v. Redmond*, 180 Fed. 92. Section 11 of the 1910 amendment to the Bankruptcy Act under which the principal case was decided, provides that a preference shall be voidable when the person receiving it shall have reasonable cause to believe that the enforcement of the transfer "would effect a preference." Under the present law, therefore, the intent of the debtor and the creditor's belief as to his intent are immaterial in determining whether a preference is voidable. It is to be noted, however, that to render the transfer an act of bankruptcy the debtor must still intend a preference. BANKRUPTCY ACT OF 1898, § 3 *a* (2).

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHTS OF ACTION ARISING UPON CONTRACT: EFFECT OF AMENDMENT OF 1910. — A materialman filed notice of his lien, within the period prescribed by the lien law, but two days after the adjudication in bankruptcy of the contractor, to whom money was owing under his contract to pave the city streets. The 1910 amendment to § 47 *a* of the Bankruptcy Act of 1898 gives the trustee the rights of a lien creditor on property in the custody of the court, but as to property not in the custody of the court the rights of a judgment creditor holding an execution returned unsatisfied. *Held*, that the materialman prevails, on the ground that the property is not in the custody of the court. *Hildreth Granite Co. v. City of Watervliet*, 161 App. Div. (N. Y.) 420.

It seems a serious error to apply the amended § 47 *a* of the Bankruptcy Act to a case like the present. That amendment was primarily intended to prefer the trustee to claimants under unrecorded conditional sales and abolish the rule of *York Mfg. Co. v. Cassell*, 201 U. S. 344. See 24 HARV. L. REV.

620. It gives the trustee in bankruptcy power over property in the bankrupt's hands to which another has title by virtue of a private agreement with the bankrupt. *In re Hammond*, 26 Am. B. R. 336. Section 70 a of the original act gives the trustee the bankrupt's title to rights of action arising upon contract. The amended section 47 a however speaks of giving a lien, and it would be anomalous for the trustee to have a lien on claims to which he already has title. Nor is there any specific sum in a contract debtor's hands to which a lien could attach. On its face, therefore, the amendment could not be intended to apply to the principal case. The trustee in bankruptcy here had title to the claim, and if the materialman is to prevail, it must be on the ground that he had already acquired a valid lien under the state law, good against the trustee, although not completely perfected before bankruptcy. *Crane Co. v. Pneumatic Signal Co.*, 94 App. Div. (N. Y.) 53; *In re Huston*, 7 Am. B. R. 92. Cf. *In re Roeber*, 121 Fed. 449.

BANKS AND BANKING — COLLECTIONS — LIABILITY FOR NEGLIGENCE OF CORRESPONDENT BANK. — The A. Bank gave a note, of which it was the indorsee, to the B. Bank for collection, under an agreement that the latter should only be responsible for negligence in choosing its correspondents. The B. Bank forwarded to the C. Bank under a similar agreement. The C. Bank forwarded to the D. Bank, which in turn forwarded to the E. Bank, neither of these banks making any reservation as to liability. Through the negligence of the E. Bank in presenting the note for payment, the indorser was released. The maker of the note was insolvent. The A. Bank now sues the D. Bank. *Held*, that it can recover. *McBride v. Illinois National Bank*, 163 App. Div. (N. Y.) 417.

New York has adopted the view of many other American courts that in the absence of special agreement a depository bank is liable for the default or negligence of its correspondents. *National Revere Bank v. National Bank of Republic*, 172 N. Y. 102, 64 N. E. 799; *St. Nicholas Bank v. State National Bank*, 128 N. Y. 46, 27 N. E. 849. *Contra, Wilson v. Carlinville National Bank*, 187 Ill. 222, 58 N. E. 250. Under this rule, however, in a chain of collecting banks, only the depository bank is directly liable to the depositor for the acts of its correspondents, for the latter are regarded as the agents not of the depositor, but of the depository bank. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459, 464. Nor will a special agreement protecting the depository bank, according to the first appeal of the principal case, thrust this direct liability upon all the subsequent banks. *McBride v. Illinois National Bank*, 138 App. Div. 339, 121 N. Y. Supp. 1041. See 23 HARV. L. REV. 639. This liability for the acts of the correspondent banks, the second appeal now adds, devolves upon the first bank in the chain which does not protect itself by special reservation. The theory appears to be that the agreement constitutes the depository bank, and each succeeding correspondent similarly protected, a mere agent to employ some other bank as collector. It seems a very forced construction, however, to hold that the reservation goes beyond relieving the depository bank from the rule of *respondent superior*, and affects the liability of the correspondent banks. Nor can the reservation be construed to do more than release the depository bank from an implied warranty of its correspondents, if that be taken as the basis of its liability. Under the rule prevailing in many other jurisdictions only the ultimate correspondent bank would be liable anyway, and the special agreement protecting the depository bank would therefore be immaterial. *Farmer's Bank of Virginia v. Owen*, 5 Cranch C. C. 504.

BANKS AND BANKING — COLLECTIONS — NATURE OF LIABILITY OF DEPOSITORY BANK. — The plaintiff deposited at the defendant bank a check on

another bank drawn to his order and indorsed in blank. The defendant placed the full amount to the plaintiff's credit subject to check and the plaintiff drew on it. A month later the defendant sought to charge the amount to the plaintiff's account, on the ground that the check had been lost in the mail. *Held*, that the bank cannot charge it back. *Spooner v. Bank of Donalsonville*, 82 S. E. 625 (Ga.).

The nature of the liability of a bank in which a check indorsed in blank is deposited for collection properly depends upon the intent of the parties. Presumptively, however, the transaction should not be regarded as a sale, but rather as an agency, or more accurately, as a trust, since legal title passes by the indorsement. *Scott v. Ocean Bank*, 23 N. Y. 289. See 18 HARV. L. REV. 300. Nor is the additional fact that the depositor is allowed to draw against the check at once conclusive of a sale. *Moors v. Goddard*, 147 Mass. 287. *Contra*, *Hoffman v. First National Bank*, 46 N. J. L. 604. See 13 HARV. L. REV. 416. Under this view, the bank should not be liable for the amount of the check unless itself at fault. Many cases, however, agree with the principal case, and hold the transaction presumptively a sale, at least when credit is given the depositor. *Metropolitan National Bank v. Loyd*, 90 N. Y. 530; *Burton v. United States*, 196 U. S. 283; *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329. A question then arises as to the effect of an arrangement between the parties that the bank may charge back if the check proves uncollectible. Here, too, the courts differ; but many hold that the result is to make the bank a mere agent, and not a debtor. *Fanset v. Garden City State Bank*, 24 S. D. 248, 123 N. W. 686; *Davis v. Butlers Lumber Co.*, 130 N. C. 174, 41 S. E. 95. Properly, however, such an arrangement should not negative what would otherwise be regarded as a sale, for it simply provides a short cut for enforcing the indorsee's rights against the indorser. *Burton v. United States*, *supra*; *Aebi v. Bank of Evansville*, *supra*. On that construction, an arrangement for charging back in the principal case would leave the transaction still a sale, but the case would not even then be a proper one for the bank to charge the depositor as its indorser.

CARRIERS — PASSENGERS: EJECTION OF PASSENGERS — REFUSAL TO PAY UNLAWFUL FARE. — An electric railway company interpreted the two franchises under which it was operating as authorizing a fare of fifteen cents between two points. The plaintiff, upon refusing to pay more than ten cents to ride this distance, was ejected from a car and sued the company for assault and battery. The court found that upon a proper construction of the franchises ten cents was the maximum lawful fare. *Held*, that the plaintiff may recover. *Raynor v. New York & L. I. Traction Co.*, 86 Misc. (N. Y.) 201, 149 N. Y. Supp. 151 (Nassau County Ct.).

At present the authorities tend to decide in favor of the passenger the old conflict concerning a carrier's liability for ejecting a passenger whose failure to produce a proper ticket is the fault of the carrier's agents. See 20 HARV. L. REV. 137. Thus a passenger who has received an invalid ticket or an improper street car transfer may generally recover for his consequent ejection. *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60; *Murdock v. Boston & Albany R. Co.*, 137 Mass. 293. *Contra*, *Norton v. Consolidated Ry. Co.*, 79 Conn. 109, 63 Atl. 1087. *Cf. Shelton v. Erie R. Co.*, 73 N. J. L. 558, 66 Atl. 403. Again, the weight of authority is that a passenger who has been denied an opportunity to buy a ticket may recover if ejected for refusing to pay the higher cash fare. *Forsee v. Alabama G. S. R. Co.*, 63 Miss. 66; *Ammons v. Southern Ry. Co.*, 138 N. C. 555, 51 S. E. 127. *Contra*, *Monnier v. New York Central & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569. In spite of the carrier's primary fault, the real necessity for a regulation requiring the production of tickets, and the possible application of the rule against avoidable damages,

raise serious doubts as to the advisability of giving the passenger any other protection than a recovery for the carrier's original neglect of duty. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 889 *et seq.*; 16 HARV. L. REV. 139. But in any event the result in the principal case is unimpeachable. The resistance here was not to the enforcement of a regulation of the carrier, but to the collection of a fare in excess of that allowed by law. It is well settled that in such a case one may recover for being ejected. *Adams v. Union R. Co.*, 21 R. I. 134, 42 Atl. 515.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT TO HEAR ADVERSE EVIDENCE IN HEARING BEFORE ADMINISTRATIVE BOARD. — On an appeal to the English Local Government Board, made under the Housing Acts (53 & 54 Vict., c. 70; 9 Edw. VII., c. 44), from a decision refusing to terminate a closing order against a tenement house, the appellant was heard but was refused access to certain adverse reports which the Board had as evidence against him. The Board was given authority to formulate rules of procedure. *Held*, that the appellant had a proper hearing. *Local Government Board v. Arlidge*, Weekly Notes, No. 30, p. 328 (House of Lords).

For a discussion of this most important decision and its bearing on the question of the procedure in hearings before administrative boards, see NOTES, p. 198.

DISCOVERY — PRIVILEGE — NOTES OF PREVIOUS LEGAL PROCEEDINGS MADE IN ANTICIPATION OF FUTURE LITIGATION. — In anticipation of further litigation, the defendant had had shorthand notes taken of the proceedings against him by the owner of the taxicab with which his automobile had collided. In an action against the same defendant arising out of the same collision, the plaintiff asks discovery and inspection of the notes in the possession of the defendant. *Held*, that discovery will be ordered. *Lambert v. Horne*, 111 L. T. R. 179 (C. A.).

This case is in accord with the great weight of English authority. *Rawstone v. Preston Corporation*, 30 Ch. D. 116; *In re Worswick*, 38 Ch. D. 370; *Nicholl v. Jones*, 2 H. & M. 588; *Ainsworth v. Wilding*, [1900] 2 Ch. D. 315. *Contra*, *Nordon v. Defries*, 8 Q. B. D. 508. There is no American authority directly in point, although shorthand notes of proceedings before the grand jury have been held privileged, on the ground that such proceedings are not *publici juris*. *State v. Rhoads*, 81 Oh. St. 397, 91 N. E. 186. It is true that the privilege protecting communications between attorney and client covers material collected for submission to a solicitor or information obtained by the solicitor for the purposes of litigation. *Southwark & Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315; *Lyell v. Kennedy*, 27 Ch. D. 1. But proceedings in open court are in no way privileged or confidential. *In re Worswick*, *supra*; *People v. Petersen*, 60 N. Y. App. Div. 118. And since the words themselves are not privileged, the principal case properly orders discovery of a physical reproduction of them, which involved no peculiar skill or knowledge. For the law cannot deal justly between the parties if either has an unfair advantage, and so long as no hard and fast rule of privilege stands in the way, the court should require any disclosures necessary to aid in reaching an equitable result.

DOMICILE — HUSBAND AND WIFE: POSSIBILITY OF SEPARATE DOMICILE. — A wife lived in New York for twenty-six years apart from her husband, who lived outside the state. She had made no attempt to obtain a decree of separation, nor were grounds therefor shown. *Held*, that she had acquired a domicile in New York. *In re Crosby's Estate*, 85 Misc. (N. Y.) 679 (Surr. Ct., N. Y. County).

For a discussion of the wife's rights to acquire a domicile apart from her husband without showing cause for divorce, see this issue of the REVIEW, p. 196.

EMINENT DOMAIN — FOR WHAT PURPOSES PROPERTY MAY BE TAKEN — LAND CONDEMNED BY RAILROAD USED FOR PRIVATE WAREHOUSE. — A railroad condemned for its right of way land owned in fee by the plaintiff. Subsequently the railroad leased the land for private warehouse purposes to the defendant, who agreed to prefer the railroad in routing freight. The plaintiff now seeks to recover possession. *Held*, that he cannot recover. *Coit v. Owenby-Wofford Co.*, 81 S. E. 1067 (N. C.).

The principal case takes the ground that, while the land was used directly for a private business, the chief purpose was to afford facilities for the lessee, as a patron of the road, in the storage, receipt, and shipment of freight. If the lessee was one of the largest shippers at that point, and the erection of the warehouse would greatly relieve the facilities for general freight, the lease of railroad land with that end in view would be strictly parallel to the construction of a spur track which reaches only a single large shipper, but improves traffic conditions in general by affording increased trackage facilities and relieving congestion at the point. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598. Such a warehouse, again by analogy to the spur track, would be under obligation to serve the general public in case demand were made. See *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 220. Unless these facts are assumed as the basis of the present decision, the result must be regarded as wrong. For an ordinary private warehouse, which bears no relation to the transportation facilities of the railroad, is undoubtedly an improper user. *Proprietors of Locks and Canals on Merrimack River v. Nashua & Lowell R. Co.*, 104 Mass. 1. A public warehouse, on the other hand, would unquestionably have been a public purpose. *Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70, 65 N. W. 136.

EXECUTORS AND ADMINISTRATORS — TITLE — EFFECT OF REVOCATION OF ADMINISTRATION UPON *BONÂ FIDE* PURCHASER'S TITLE TO ASSETS. — An administrator sold assets to the defendant, a *bonâ fide* purchaser. Thereafter a will was discovered, which appointed the plaintiff executor. He probated the will, had the administration revoked, and now sues the defendant to recover the property. *Held*, that he may not recover. *Hewson v. Shelley*, [1914] 2 Ch. 13 (C. A.).

The grant of probate or administration by a court of competent jurisdiction is a judicial act which, until revoked, is conclusive of the rights determined. *Prosser v. Wagner*, 1 C. B. N. S. 289; *In re Ivory*, 10 Ch. D. 372. Consequently, payment of a debt to a regularly appointed executor or administrator is a good discharge, although the probate or grant is afterwards revoked. *Allen v. Dundas*, 3 T. R. 125. In spite of this principle, the earlier English authorities held that a title acquired under a grant of administration was void against the executor of a subsequently discovered will. The theory was that on the death of the testator title had vested in the executor by force of the will, and that, therefore, the grant of administration conferred no title upon the administrator. *Graysbrook v. Fox*, 1 Plowd. 275; *Ellis v. Ellis*, [1905] 1 Ch. 613. But American courts have never recognized this exceptional doctrine. *Kittredge v. Folsom*, 8 N. H. 98. See *Monroe v. James*, 4 Munf. (Va.) 194, 196. If the purchaser's title were thus liable to be adjudged worthless, the effective administration of estates would be impeded and respect for judicial acts considerably impaired. It is well, therefore, that the technical English doctrine, born of a time when the ecclesiastical courts were held in jealous disfavor, has been definitely repudiated by the principal case.

INJUNCTIONS — NATURE AND SCOPE OF THE REMEDY — INJUNCTION AGAINST CONTINUING TRESPASS WHERE DAMAGES ARE NOMINAL. — The defendant, the owner of a water-power plant, built a dam in such a way that the level of the stream was raised as it flowed through a chasm owned by the plaintiff. The property encroached upon was of no possible use to the owner, and there had been a judicial determination that the damages were only nominal. The injunction sought by the plaintiff against the continuance of the trespass would cause serious inconvenience to the defendant and to the public. *Held*, that the plaintiff is not entitled to injunctive relief. *McCann v. Chasm Power Co.*, 211 N. Y. 301, 105 N. E. 416.

The inadequacy of the legal remedy and the danger of a multiplicity of suits establishes the jurisdiction of equity to restrain a continuing trespass. *Goodson v. Richardson*, L. R. 9 Ch. App. 221; *Delaware, L. & W. R. Co. v. Breckenridge*, 57 N. J. Eq. 154, 41 Atl. 966. But whether it will be exercised where the damages are only nominal, and the resulting inconvenience to the defendant great, has caused much diversity of judicial opinion. The English authorities argue that the owner's damages from a permanent invasion of his land are of necessity substantial, because of his present power to exact a high price from the trespasser for the coveted privilege, and the danger of the ultimate acquisition of the right by adverse user. *Goodson v. Richardson*, *supra*; *Powell v. Aiken*, 4 K. & J. 343. But the adverse user is easily interrupted and the policy of the principal case seems on the whole more equitable than the rigid rule of the English courts. The danger that it may encourage wilful appropriation of another's land undoubtedly exists. But this seems outweighed by the danger that by granting an injunction a court of equity might be furnishing the owner with a weapon for extorting an unconscionable price for the privilege. Weight should be given also to the consideration that here public interest is against granting an injunction. *Conger v. New York, etc. R. Co.*, 120 N. Y. 29. On the balance of convenience, therefore, equity seems justified in refusing its extraordinary relief. *Bassett v. Salisbury Manufacturing Co.*, 47 N. H. 426; *Crescent Mining Co. v. Silver King Mining Co.*, 17 Utah 444, 54 Pac. 244; *McCullough v. Denver*, 39 Fed. 307. *Contra*, *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113.

INSURANCE — ACCIDENT INSURANCE — MEANING OF "ACCIDENTAL" IN THE POLICY. — The insured saw a man accidentally burned to death, and was so affected that he died shortly afterward of apoplexy, produced either by the intense excitement of witnessing the fire or by a fall caused by fainting from such excitement, and perhaps by both. The beneficiary now sues upon an insurance policy payable in the event of the "accidental death" of the insured. *Held*, that the trier of the facts could reasonably find the death to have been accidental. *International Traveler's Ass'n v. Branum*, 169 S. W. 389 (Tex. Civ. App.).

The word "accident" in insurance policies has been productive of frequent litigation. Its meaning is purely a question of fact, determined by what an ordinary reasonable man would consider an accident in the popular sense. *United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100, 121. See 24 HARV. L. REV. 221. Death from disease, of course, is ordinarily not an accident. *Sinclair v. Maritime, etc. Ins. Co.*, 3 E. & E. 478. But when the disease is itself directly attributable to a previous accident, as where a fall produces apoplexy, the death is justly considered accidental. *National Benefit Ass'n v. Grauman*, 107 Ind. 288. This authority would probably cover the principal case, assuming that the fall was responsible for the apoplexy. For a sudden and temporary physical disturbance like the fainting spell is properly not a disease. *Manufacturer's Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, 955; *Meyer v. Fidelity & Casualty Co.*, 96 Iowa 378, 65 N. W. 328. The death seems no less accidental

on the assumption that the excitement produced the apoplexy. In a sense, deliberately witnessing an accident is not an accident, and the natural excitement of such an occasion is perhaps not accidental. Nevertheless the fatal physical reactions were induced not by forces arising primarily within the system, but by something external, by a violent spectacle which affected the beholder in a most abnormal and improbable way. See *Yates v. South Kirby, etc. Collieries Ltd.*, [1910] 2 K. B. 538. Though the outside occurrence operated in mental channels rather than by direct physical contact, the unexpected effect should not be deemed any less an accident. And so it seems to have been held. *McGlinchy v. Fidelity & Casualty Co.*, 80 Me. 251, 14 Atl. 13; *Pugh v. London, B. & S. C. Ry. Co.*, [1896] 2 Q. B. 248.

LEGACIES AND DEVISES — DISCLAIMER BY PAROL. — A testatrix, survived by sons and daughters, had devised and bequeathed her entire estate to the daughters. Shortly after her death the will was destroyed by the sons in the presence of the daughters and without objection on their part. Within a few days the daughters, without consideration, signed an informal writing waiving all rights under the will. They now sue for their interest thereunder. *Held*, that they cannot recover. *Dueringer v. Klocke*, 86 Misc. (N. Y.) 404, 149 N. Y. Supp. 332.

The decision takes the ground that the destruction of the will was a valid disclaimer, of which the written waiver was only a memorandum. In this country a parol disclaimer by a devisee or legatee is effective. *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505; *Wonseller v. Wonseller*, 23 Pa. Super. Ct. 321; *Tarr v. Robinson*, 158 Pa. 60. *Contra*, *Bryan v. Hyre*, 1 Rob. (Va.) 94. The law is probably the same in England, but the point has not been definitely decided. See *Townson v. Tickell*, 3 B. & Ald. 31, 38; *Doe d. Smyth v. Smyth*, 6 B. & C. 112, 117; SHEPPARD'S TOUCHSTONE, 452; 4 KENT, COMMENTARIES, 534. *Bryan v. Hyre*, *supra*, is often cited for the proposition that a disclaimer of realty can only be effected by deed, but the case merely upheld a charge that such disclaimer must be in writing. There is no modern authority to support that decision, although the ancient rule was that a disclaimer must be by matter of record. See *Buller and Baker's Case*, 3 Coke 25, 26 a; 8 VIN. ABR., DISAGREEMENT. Whether a given set of acts constitutes a disclaimer is a question of fact. *Defreese v. Lake*, *supra*. And the renunciation must be unequivocal. *Webster v. Gilman*, Fed. Cas., No. 17,335. The principal case is clearly correct, although on the ground taken by the court, that the destruction of the will alone constituted a disclaimer, it is arguable that the question should have been left to the jury. A devisee's or legatee's situation is to be distinguished from an heir's, for when property passes by descent, title vests without any possibility of renunciation. *Watson v. Watson*, 13 Conn. 83.

LIMITATION OF ACTION — NATURE AND CONSTRUCTION OF STATUTE — LEGAL DISABILITY: WHETHER PLAINTIFF'S PROOF IN BANKRUPTCY STOPS RUNNING OF STATUTE. — A creditor whose right accrued just before the debtor's bankruptcy in 1904 proved his claim in bankruptcy and was paid dividends upon it. In 1908 he brought suit in the state court, and this action was continued until in 1910 the debtor's application for a discharge in bankruptcy was refused. The period of limitation under the state statute was three years, but any person under a legal disability might bring an action within a year after the disability was removed. *Held*, that the plaintiff's action is barred. *Simpson v. Tootle, etc. Co.*, 32 Am. B. R. 551 (Okla.).

Whether the pendency of bankruptcy proceedings against a defendant constitutes a legal disability upon the plaintiff has not been decided previously under the present bankruptcy act. Under the law of 1867 a creditor who

proved his claim in bankruptcy was held to be disabled, because he was forbidden to maintain an action in any other court until the question of the bankrupt's discharge was determined. *Hall v. Greenbaum*, 33 Fed. 22; *Rosenthal v. Plumb*, 25 Hun (N. Y.) 336. But if his claim, though provable, was not proved, the statute would run against him, for he was not unqualifiedly prohibited from bringing suit elsewhere. *Cleveland v. Johnson*, 5 Misc. (N. Y.) 484, 26 N. Y. Supp. 734; *Davidson v. Fisher*, 41 Minn. 363, 43 N. W. 79. The present law in terms provides for staying only such suits as are pending against the bankrupt when the petition is filed, and is mandatory only for the period up to the adjudication of bankruptcy. BANKRUPTCY ACT OF 1898, § 11. The power to restrain suits brought later must, therefore, be found by implication or in the general equitable power of the court to protect its jurisdiction. See *In re Basch*, 97 Fed. 761; COLLIER, BANKRUPTCY, 9 ed., 262. In so far as the mandatory provision does not control, the granting of injunctions to stay proceedings in other courts is governed by the sound discretion of the court of bankruptcy. *In re Globe Cycle Works*, 2 Am. B. R. 447; *In re Franklin*, 106 Fed. 666; *In re Mercedes Import Co.*, 166 Fed. 427. The consequent possibility of successfully prosecuting a suit during the pendency of bankruptcy proceedings against the defendant would seem to justify the principal case.

PLEDGES — LOSS OF LIEN — REDELIVERY TO PLEDGOR AS AGENT. — An automobile company delivered an automobile to the defendant by way of pledge. The defendant immediately returned the car and stored it in the company's garage, for purposes of demonstration and sale. The automobile company then became insolvent, and its trustee in bankruptcy now claims the machine as against the pledgee. Held, that the trustee in bankruptcy takes subject to the pledge. *W. S. Biles & Co. v. Elliotte*, 215 Fed. 340 (C. C. A., 6th Circ.).

The general rule is that a pledgee's interest must be evidenced by possession. *Black v. Bogert*, 65 N. Y. 601; *Collins v. Buck*, 63 Me. 459. But the authorities allow the pledgee to return the property to the pledgor for a temporary or special purpose without loss of the lien between the parties. *Cooper v. Ray*, 47 Ill. 53; *Way v. Davidson*, 12 Gray (Mass.) 465. Many cases anomalously hold that under such circumstances the lien is good even against intervening rights. *McClung v. Colwell*, 107 Tenn. 594, 64 S. W. 890; *Northwestern Bank v. Poynter, Son, & MacDonalds*, [1895] A. C. 56. Contra, *Bodenhammer v. Newsom*, 5 Jones (N. C.) 107. Where actual delivery of the property is difficult and inconvenient, there is a modern tendency to hold the pledge valid, if the goods are clearly marked to indicate the pledgee's possession, although they remain on the premises of the pledgor. *Philadelphia Warehouse Co. v. Winchester*, 156 Fed. 600; *Bush v. Export Storage Co.*, 136 Fed. 918. But this doctrine, which must be based on the notice of the pledgee's equitable rights given by the marks, has no application when the goods bear no evidence of the pledge. *American Can Co. v. Erie Preserving Co.*, 171 Fed. 540; *Bank of North America v. Penn Motor Car Co.*, 235 Pa. 194, 83 Atl. 622. The principal case seems to go farther than any of these authorities justify, and can only be supported as an extension of the doctrine concerning redelivery to the pledgor for a special purpose. Although well settled, this exception is doubtful in theory, and it is very undesirable to extend it so far that it virtually does away with the rule that possession is necessary to a valid pledge.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — REGULATION OF COMBINATION WITHOUT DISSOLUTION: INJUNCTION AGAINST "FIGHTING SHIPS." — Several large transatlantic steamship lines formed a combination to regulate the transportation of steerage passengers. Competition among the members was reduced, but rates were not unduly increased, and the service

and accommodations were much improved. In order to destroy competition, the combination ran "fighting ships" at cut rates to divert trade from rival ships, sailing from the same port at the same time. The government, by suit in equity, now seeks the dissolution of the combination under the Sherman Anti-Trust Act. *Held*, that the combination will not be dissolved, but that the use of the "fighting ships" will be enjoined. *United States v. Hamburg-American Line*, 52 N. Y. L. J. 189 (Dist. Ct., S. D. N. Y.).

The court applies the rule of reason emphasized in the *Standard Oil* and *Tobacco* cases. See *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106. See 25 HARV. L. REV. 71. Under this test the "fighting ships" were found to be an unreasonable means of destroying competition and were enjoined. See 29 POL. SC. QUART. 282, 288. But the combination itself was declared in other respects reasonable, in view of all the circumstances and the benefits conferred on the public, and dissolution was accordingly refused. *Cf. United States v. St. Louis Terminal*, 224 U. S. 383. How far this application of the test of reasonableness will be sustained is not clear at present. See 28 HARV. L. REV. 87. In reaching its conclusion the court in the principal case received valuable aid from the report, based on similar evidence, of the Standing Committee on Merchant Marine and Fisheries. 63d CONGRESS, 2d SESSION, H. DOC. 805. Ordinarily such extensive data are not available to the courts when the reasonableness of a given restraint of trade is in question, and the result is therefore apt to depend upon the individual economic theories of the court. These difficulties, however, may perhaps be overcome by placing the matter in the hands of a single special tribunal, and the recent legislation establishing the Federal Trade Commission is designed to accomplish this result. 63d CONGRESS, PUBLIC ACT, NO. 203, approved September 26, 1914.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — SALE OF LOTS ACCORDING TO A PLAT. — The defendant divided her land for sale into building lots according to a plat, and conveyed a lot to the plaintiff's predecessor in title, by a deed referring to the plat, which showed the abutting lot to be a large undivided corner lot, owned by the defendant. The defendant is now offering for sale a portion of this corner lot contrary to the general plat, and the plaintiff brings a bill in equity to prevent the sale. *Held*, that the relief sought will be granted. *Schickhaus v. Sanford*, 91 Atl. 878 (N. J., Chanc.).

A restriction upon the use of land will be enforced by equity against purchasers with notice in favor of land intended to be benefited by the restriction. *Tulk v. Moxhay*, 2 Ph. 774; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206. This doctrine is not confined to any legal analogy, but is purely equitable and is based upon the principle that equity will carry out the intent of the parties. *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 364; see 24 HARV. L. REV. 574. The form of the agreement will therefore be immaterial, for equity looks behind the form, and enforces the intent to bind the one piece of land for the benefit of the other. *Tulk v. Moxhay*, *supra*. This intent appears clearly where, as in the principal case, there is a conveyance with reference to a plat which shows the restrictions, and equity properly regards the land sold under such a general scheme as bound by the restrictions. *Tallmadge v. East River Bank*, 26 N. Y. 105. Furthermore, the dominant owners will be able to enforce the servitude against the land bound, irrespective of the order of purchase. *Elliston v. Reacher*, [1908] 2 Ch. 374, 665; *Barrow v. Richard*, 8 Paige (N. Y.) 351. All difficulties as to notice are obviated, of course, when the restrictions are sought to be enforced against land still retained under the scheme by the original grantor.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — WHERE THE COVENANTEE HAS NO CORPOREAL INTEREST IN ADJOINING LAND. — The predecessor in title of the defendant covenanted with the London County Council that, in consideration of the latter's sanctioning the laying out of a street across his property, he would not build at the end of the proposed street, where the Council intended to continue the street at a later time. The Council sought to enforce this covenant against the defendant, the present owner, who took the land with notice. *Held*, that the covenant cannot be enforced. *London County Council v. Allen*, [1914] 3 K. B. 642.

See page 201 of this issue of the REVIEW for a discussion of the nature and proper limits of the doctrine of equitable servitudes.

SALES — IMPLIED WARRANTY — EXCLUSION BY EXPRESS WARRANTY. — The defendant, a canner, contracted to sell to the plaintiff, a jobber of bakers' supplies, a quantity of canned apples guaranteed for six months against "swells," caused by gas from the souring of the fruit. After delivery, the apples developed a strong flavor of gasoline and rubber, so that the plaintiff's customers refused to purchase them. He now sues the defendant on an implied warranty of fitness and merchantability. *Held*, that the plaintiff may recover. *Wolverine Spice Co. v. Fallas*, 148 N. W. 701 (Mich.).

Ordinarily a warranty of merchantability and fitness for the intended purpose would be implied on a sale of unspecified goods such as that in the principal case. *Hood v. Bloch Bros.*, 29 W. Va. 244, 11 S. E. 910. It is sometimes said, however, that this implication is necessarily excluded by an express warranty in the contract. See *Turl's Sons v. Williams, etc. Co.*, 136 App. Div. 710, 712; 121 N. Y. Supp. 478, 480. In certain cases, of course, an express warranty clearly shows an intention to exclude any implied agreements, as when the seller expressly warrants only certain qualities, or when he agrees simply that the product shall conform to specifications furnished by the buyer. *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 257, 101 N. W. 903; *Gill & Co. v. National Gaslight Co.*, 172 Mich. 295, 137 N. W. 690. The same intention is apparent when the express warranty is as broad as that sought to be implied, but is unavailable, because the buyer has not performed a condition precedent. *Wasatch Canning Co. v. Morgan Canning Co.*, 32 Utah 229, 89 Pac. 1089. But it seems clear that a simple warranty of quality, not in any respect inconsistent with the implication, does not exclude an implied warranty of fitness and merchantability, for warranties are usually expressed in the contract to protect the buyer, not to limit the liability of the seller. *Cook v. Darling*, 160 Mich. 475, 125 N. W. 411; *Boulware v. Victor Auto Mfg. Co.*, 152 Mo. App. 524, 134 S. W. 7. See UNIFORM SALES ACT, § 15 (6).

SPECIFIC PERFORMANCE — DEFENSES — CLEAN HANDS: APPLICATION OF THE MAXIM TO BASEBALL CONTRACTS. — The defendant, a baseball player of exceptional ability, was induced by the plaintiffs to sign a contract to play for them, although they knew that he was obliged by the reserve clause of his contract with the Philadelphia Club to offer his services for the season to that club. The Philadelphia Club had the right to terminate this contract on ten days' notice to the defendant. The plaintiffs seek an injunction to restrain the defendant from playing for the Philadelphia Club. *Held*, that the injunction will be refused. *Weegham v. Killifer*, 215 Fed. 168 (Dist. Ct., W. D., Mich.); affirmed, 215 Fed. 289 (C. C. A., 6th Circ.).

The defendant here was bound by a contract similar to the one in the previous case to play baseball for the plaintiff during the season. The contract was the one prescribed by the National Commission under the National Agreement, which controls forty leagues and substantially all professional baseball players in the country. The defendant broke this contract and signed another with

the Buffalo Federal League Club. The plaintiff seeks an injunction to restrain the defendant from playing for any other club during the period of their contract. *Held*, that the plaintiff is not entitled to the relief sought. *American League Baseball Club of Chicago v. Chase*, 149 N. Y. Supp. 6 (Sup. Ct.).

Both cases illustrate the application of the maxim that he who comes into equity must come with clean hands. In the first case, if the prior contract were enforceable, inducement of a breach would be clearly a legal wrong. *Lumley v. Gye*, 2 E. & B. 216, 22 L. J. Q. B. 463; *Wanderers Hockey Club v. Johnson*, 25 West. L. R. 434 (Brit. Col.). The courts have held, however, that the reserve clause is merely an agreement to make a contract if the parties can agree, and is not enforceable at law or in equity. *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. C. 393, 9 N. Y. Supp. 779. But the plaintiff's conduct in inducing a breach of the obligation is still inequitable enough to warrant a denial of injunctive relief. *Cf. Keane v. Boycott*, 2 H. Bl. 511. The second case refuses relief on the double ground of the lack of mutuality of remedy arising from the club's option to terminate and the inequitableness of the plaintiff's conduct in striving to obtain a monopoly of the baseball business. On the point of mutuality, the court follows the weight of authority, although what appears to be a better view would enjoin a breach. *Philadelphia Ball Co. v. Lajoie*, 202 Pa. 210, 51 Atl. 973. See Ames, *Mutuality in Specific Performance*, 3 COL. L. REV. 1, 11. The denial of equitable relief because of the plaintiff's part in a monopolistic combination rests upon the substantially absolute control exercised by the association of baseball clubs operating under the National Agreement over the transfer and exchange of professional players. As the court says, such a combination is clearly not monopoly within the Sherman Anti-Trust Law, for it does not involve control of interstate commerce. See *Metropolitan Opera Co. v. Hammerstein*, 147 N. Y. Supp. 532, 535 (Sup. Ct.). The conclusion that it is nevertheless an illegal monopoly at common law is more doubtful, for there was no evidence of unlawful or oppressive measures or that the combination was more than a reasonably necessary means of regulating professional baseball. See EDDY, COMBINATIONS, §§ 305, 559. But if the arrangement is to be regarded as monopolistic because of its undue interference with the individual's freedom of contract, it is clear that equity will not aid it. *O'Brien v. Musical Mutual Protective Union*, 64 N. J. Eq. 525, 54 Atl. 150.

TAXATION — WHERE PROPERTY MAY BE TAXED — TAXATION OF FOREIGN CORPORATIONS ON CREDITS IN HANDS OF LOCAL AGENT. — A Tennessee corporation had an office in Alabama. By statute, Alabama levied a tax on the solvent credits payable in Alabama arising from the corporation's local business there. *Held*, that the tax is valid. *State v. Tennessee Coal, Iron, & R. Co.*, 66 So. 178 (Ala.).

A corporation has its domicile only in the State in which it is incorporated. *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154, 51 N. E. 531; *Chafee v. Fourth National Bank*, 71 Me. 514. Accordingly, it must be on some basis other than domicile that a state in which a foreign corporation maintains a branch office is able to tax the corporation for credits arising from the local business. And except for that fictional situs at the obligee's domicile, a chose in action as such can have no situs. See 27 HARV. L. REV. 107, 113; 28 *ibid.* 104. From the business point of view, however, such credits form part of the stock in trade of the local office, and are taxable accordingly as property within the jurisdiction. *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 545; *Hubbard v. Brush*, 61 Oh. St. 252, 55 N. E. 829. But the cases properly insist that the branch office be more than a mere collection agent, and will permit a tax only on the credits that are really part of the local office's investment. *Reat v. People*, 201 Ill. 469, 66 N. E. 242; *Myers v. Seaberger*, 45 Oh. St. 232, 12

N. E. 796. In the principal case, the court talks of commercial domicile, and of the situs of choses in action, but the true basis of the decision must be that the credits in question represent business capital employed in the state, taxable in much the same manner as any merchant's stock in trade.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — JUSTIFICATION — INTERPRETATION OF ENGLISH TRADES DISPUTES ACT OF 1906. — A stevedores' association, by agreement with a dockworkers' union, undertook to maintain union conditions and rates of pay, while the dockworkers agreed to protect the stevedores in maintaining a scale of charges to customers, by refusing to work for any stevedore who undercut the accepted rates. The plaintiff, a stevedore, maintained union conditions for his workmen but refused to join the association, and charged less than the association's rates to shipowners. The defendants, three stevedores and three union officials, therefore induced his men to strike, in violation of their contracts. The TRADES DISPUTES ACT of 1906, 6 Edw. VII, c. 47, § 3, establishes a defense to this type of action if the acts complained of are done "in contemplation or furtherance of a trade dispute." Section 5 (3) then defines a trade dispute as "any dispute between employers and workmen, or between workmen and workmen," connected broadly with conditions or terms of employment. The jury found that this was a dispute between employers, and that the dockworkers were "brought in to assist" the stevedores' association. *Held*, that this was not a "trade dispute" under the act. *Long v. Larkin*, [1914] 2 Ir. K. B. 285 (C. A.).

If one man joins another in a dispute with a third party, it seems to follow that a dispute arises between him and the third party. But the gist of the decision in the principal case is that if workmen take sides in a quarrel between employers, they are not necessarily engaged in a dispute with employers. The vice of the court's interpretation of the act is that it seeks in the origin and motive of the dispute, not in the fact of its existence, the defense accorded by the statute. Only a year before, the English Court of Appeal reached substantially the opposite conclusion, and held that if a strike is called, the fact that it is inspired by ill will does not overthrow the statutory defense. *Dallimore v. Williams*, 30 T. L. R. 432. Even if one accepts the interpretation put on the statute in the principal case, it is hard to see how the facts warranted the conclusion that the dockworkers were merely meddling in the stevedores' dispute, since their own wage scale depended on their preserving the integrity of the joint agreement. One is led to suspect that judicial hostility to the policy of the statute had some part in the result. See *Conway v. Wade*, [1908] 2 K. B. 844, 855; [1909] A. C. 506, 510. The decision has more than local significance, as similar questions may arise under the so-called Clayton Act, passed by Congress, October 16, 1914, which restricts the use of injunctions in certain cases arising out of labor disputes. 63d CONGRESS, PUBLIC ACT, No. 212, § 20.

TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — AUDIBLE SIMILARITY WITHOUT FRAUDULENT INTENT. — The plaintiff sold a brand of cigars called "B. & M." The defendants sold a cigar named "P. & M." and had recently extended their trade into the territory where the plaintiff operated. The plaintiff asks an injunction against the use of this name, claiming that his trade was being injured on account of the misleading similarity in the sound of the names. It did not appear that the defendants intended to injure or divert the plaintiff's business, or that there was any resemblance in the boxes or labels of the cigars. *Held*, that the injunction will not be granted. *B. Payn's Sons Tobacco Co. v. Payette*, 149 N. Y. Supp. 183 (Sup. Ct.).

Equity interferes to protect trade marks and trade names against infringe-

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ment in order to prevent injury to the plaintiff's business by unfair competition. *Apollo Bros. v. Perkins*, 207 Fed. 530. See HOPKINS, TRADE MARKS, 2 ed., § 19. It is immaterial, therefore, whether the deceptive similarity is in the sound or appearance of the name, or in the shape or color of the package. *Welsbach Light Co. v. Adams*, 107 Fed. 463. Moreover, an intent to injure the plaintiff need not be shown ordinarily. See *Singer Machine Mfg. Co. v. Wilson*, L. R. 3 A. C. 376. But the presence of such a fraudulent intent will induce the courts to grant injunctive relief more readily in doubtful cases, as for example, against the use of the defendant's own name to the injury of the plaintiff's business. *International Silver Co. v. Rodgers Bros.*, 136 Fed. 1019. Cf. *Bernhard v. Bernhard*, 156 App. Div. 739, 142 N. Y. Supp. 94. In the principal case, the plaintiff had no property right in the defendants' trademark "P. & M.," the possibility of damage was slight, and there was no colorable imitation with intent to take advantage of the plaintiff's good will. Cf. *International Silver Co. v. Rodgers Bros*, *supra*. Balancing all considerations, therefore, in the absence of fraud the resemblance did not seem deceptive enough to justify an injunction.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — POWER OF COURT TO INTERFERE WITH DISCRETIONARY INVESTMENTS. — Certain funds were given to trustees under a settlement, with power to invest and to vary investments at their discretion among securities of certain classes. The trustees placed some of the funds in a mortgage of leasehold premises on proper valuations. A later valuation revealed depreciation, and the *cestui que trust* on originating summons, without alleging any breach of trust, now asks an inquiry whether the investment should be continued or called in. *Held*, that the inquiry will be granted. *In re D'Epinoix's Settlement*, [1914] 1 Ch. 890.

The extent to which courts will interfere with the discretion of trustees is not definitely settled on the authorities. Of course, if the trustee exercises his discretion fraudulently, or in bad faith, it is clear that the court will step in. *Portland v. Topham*, 11 H. L. Cas. 32. But where the trustee acts with perfect good faith, his discretion will be respected, with certain limitations. Thus it is well settled that courts will not attempt to control a discretion coupled with "uncontrollable authority." *Gisborne v. Gisborne*, L. R. 2 A. C. 300. Nor will they interfere with a simple discretionary power, unconnected with any duty. *In re Courtier*, 34 Ch. D. 136. But if the power or discretion involves a duty, and is meant to be exercised, its execution will be enforced. See *Read v. Patterson*, 44 N. J. Eq. 211, 219; LEWIN, TRUSTS, 12 Eng. ed., p. 766. Such a duty is commonly found in cases where the discretion is construed to cover some merely ministerial act, such as renewing an investment, or in cases where there is a duty to sell or provide maintenance, with discretion as to the time and manner. *Mortimer v. Watts*, 14 Beav. 616; *Re Burrage*, 62 L. T. R. 752; *Ransome v. Burgess*, L. R. 3 Eq. 773. The principal case illustrates a tendency to extend the power of the courts to control discretion, and the decision is to be sustained because of the trustee's duty to the beneficiaries to exercise sound judgment concerning investments, in spite of the discretion vested in him.

TRUSTS — RESULTING TRUSTS — DISTRIBUTION AMONG SUBSCRIBERS TO A FUND RAISED BY SUBSCRIPTION. — An unexpended balance of the fund raised for the relief of Balkan War sufferers was left in the hands of the British Red Cross Society at the termination of the war. An originating summons was issued to determine whether it should be divided among the subscribers in proportion to their subscriptions, or whether the last subscribers should be paid in full. *Held*, that it should be divided among all the subscribers in

proportion to their subscriptions, irrespective of date. *In re British Red Cross Balkan Fund*, [1914] 2 Ch. 419.

For a discussion of the principles involved, with particular reference to the bearing of the rule in *Clayton's Case* on the question, see NOTES, p. 193.

WAR — PRIZE — CAPTURE: RIGHTS OF NEUTRAL MORTGAGEES AND SHAREHOLDERS. — In a suit for the condemnation of a German steamship captured while flying the German flag by a British warship, claims were presented by neutral mortgagees and by British and neutral shareholders in the German company which owned the vessel. *Held*, that these claims will not be recognized. *The Marie Glaeser*, 137 L. T. J. 468, 49 L. J. 545 (Prize Court).

In time of war a vessel is often regarded as having a character distinct from that of its owners. Thus, under the Anglo-American doctrine which for purposes of maritime capture makes trade domicile in war rather than political nationality the test of enemy character, the ships of a citizen engaged in trade in enemy country, and *a fortiori* when the enterprise is incorporated there, are treated as enemy ships. *The Friendschaft*, 4 Wheat. (U. S.) 105. See *The Portland*, 3 C. Rob. 41, 42, 44; 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., p. 164. Even where this trade domicile in war is not recognized, an increasing tendency to emphasize the nationality of the flag carried produces a like result through the personification of the vessel itself. See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., p. 169. The flag's lawful use is symbolical of a definite commitment to the protection of one nation. If such protection fails, the political character of its owner is rightly of no avail. *The Danckebaar Afrikaan*, 1 C. Rob. 107. In the principal case, therefore, the shareholders must lose on any theory. The rights of the mortgagees are also properly disregarded, as are the claims of all lienholders, for however slight may be their power to determine the vessel's flag, they have accepted it and enlisted its protection. *The Hampton*, 5 Wall. (U. S.) 372; *The Battle*, 6 Wall. (U. S.) 498; *The Nigretia*, Takahashi, International Law, p. 551; *The Tobago*, 5 C. Rob. 218. Possibly the most fundamental explanation of all is the vital policy against having a prospective prize snatched away because of an unsuspected lien. For otherwise there would be a dearth of captures.

WILLS — EXECUTION — ATTESTATION: WHAT IS ATTESTED UNDER STATUTE OF FRAUDS. — The testator, after signing the instrument, presented it to the attesting witnesses as his will, but kept it so folded that they had no opportunity to see his signature. The Massachusetts statute was similar to the Statute of Frauds, and provided that a will must be signed by the testator and "attested and subscribed in his presence by three or more competent witnesses." *Held*, that the will is not properly attested. *Nunn v. Ehlert*, 106 N. E. 163 (Mass.).

This decision settles the Massachusetts law in accord with a *dictum* delivered by Mr. Justice Gray. See *Chase v. Kittredge*, 11 All. (Mass.) 49, 63. Most authorities, however, in jurisdictions where statutes similar to the Statute of Frauds govern testamentary disposition, have reached the opposite result, on the ground that the statute does not require that the signature of the testator be attested, but merely that the will be attested as the testator's act. *Ellis v. Smith*, 1 Ves. Jr. 11; *White v. Trustees of the British Museum*, 6 Bing. 310; *Dougherty v. Crandall*, 168 Mich. 281, 134 N. W. 24. Under the Wills Act it is required that the signature be "made or acknowledged by the testator in the presence of two or more witnesses." 1 Vict. c. 26, § 9. With such a provision it seems clear that the signature must be attested, and accordingly it has been held that if the witnesses have no opportunity to see the signature, as for example, if it is covered by a blotter, the instrument is not properly executed. *In the Goods of Gunstan*, 7 P. D. 102. Cf. *Daintree v.*

Fasulo, 13 P. D. 67. To reach this same conclusion in the absence of such a provision is a desirable result, scarcely justified by previous interpretation of the Statute of Frauds, but founded upon the sound reason that in requiring the attesting of a will the statute meant that all essentials to a valid will be witnessed, including the testator's signature. See *Ellis v. Smith*, *supra*.

WILLS — MUTUAL WILLS — REVOCABILITY. — A husband and wife, whose property consisted chiefly of a joint tenancy in leaseholds, executed wills found by another court to be mutual. After the husband's death, the wife executed a new will altering her previous will. The plaintiffs propounded the later will and the defendants claimed under the earlier. *Held*, that the later will must be probated. *Walker v. Gaskill*, 49 L. J. 456 (Prob. Div.).

Where a will is the result of fraud the probate court has jurisdiction to set it aside, and equity will ordinarily not be called upon to give relief. *Case of Broderick's Will*, 21 Wall. (U. S.) 503; *Allen v. M'Pherson*, 1 H. L. Cas. 191. But where the will is made in violation of a promise to devise or to die intestate, it must be recognized as the will of the testator by the probate court. The remedy is then in equity. *Ridley v. Ridley*, 34 Beav. 478; *Kundinger v. Kundinger*, 150 Mich. 630, 114 N. W. 408; *Taylor v. Mitchell*, 87 Pa. 518; *Jones v. Abbott*, 228 Ill. 34, 81 N. E. 791. Equity cannot order a new will or cancel the old, and so the relief is not precisely specific performance. Nor is it exactly a constructive trust remedy, for the measure of damages is not the enrichment of the estate or its wrongful beneficiaries, but what the promisee would have received. Courts and text-books, however, use the language of both remedies. See *Bolman v. Overall*, 80 Ala. 451, 455, 2 So. 624, 626; *Burdine v. Burdine*, 98 Va. 515, 519, 36 S. E. 992, 993. See GARDNER, WILLS, p. 85 *et seq.* The finding that wills are in fact mutual is equivalent to the finding of a contract to make wills, and equity would therefore exercise this peculiar jurisdiction in the nature of specific performance in the principal case, if called upon. *Dufour v. Pereira*, 1 Dick. 419; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 785; 1 JARMAN, WILLS, 6 Eng. ed., pp. 41-42. It is this jurisdiction which accounts for the loose expression that mutual wills are "irrevocable in equity." It should be noted, however, that some courts, on the facts, are as reluctant to find mutual wills as they are to find a simple contract to devise. *Lord Walpole v. Lord Orford*, 3 Ves. Jr. 402; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118.

BOOK REVIEWS

THE MINIMUM WAGE. By Rome G. Brown. Minneapolis: The Review Publishing Company. 1914. pp. xv, 98.

This is a significant little volume. It is another illustration of the tendency to deal with constitutional questions realistically and not as though they were a jejune branch of metaphysics. Less than four years ago the New York Court of Appeals, after paying a passing tribute to the irrelevance of the economic and sociologic data with which the Workmen's Compensation Law was sought to be justified by the Wainwright Commission, turned to the "purely legal" phases of the controversy. Now Mr. Brown, one of the leaders of the

Middle West bar, discusses the economic and ethical aspects of the minimum wage proposal as indispensable factors in determining the "purely legal" constitutional issue. This change of the method of approach is perhaps the single, most vital, contribution of constitutional law during the last few years, — the growing recognition on the part of bar and bench that the constitutional questions raised by social legislation are not to be determined by mechanical, immutable standards, but involve social philosophy, conscious or unconscious, and must be decided in relation to the evidence and claims urged by the other social sciences.

The Workmen's Compensation Law has become practically an accepted commonplace of our legislation, either through necessary state constitutional amendments or through a temper of interpretation different from that of the New York Court of Appeals. The most immediate contentious piece of legislation is the minimum wage proposal. Ten states have already enacted a measure in one form or another, ranging from the Massachusetts law, which merely calls for publicity of the findings of the Minimum Wage Commission without compulsory enforcement of such findings, to the very crude form of the Utah statute which, for all female workers, fixes a flat legislative wage; and in a number of states commissions are at work to report on the proposal. The Oregon law has been sustained by its Supreme Court (see *Stettler v. O'Hara*, 139 Pac. 743, 28 HARV. L. REV. 89), and the case is now before the Supreme Court of the United States.

Mr. Brown is immediately concerned with the Minnesota law, but with characteristic thoroughness he examines the underlying theories of this social measure, makes some reference to foreign experience (though nothing like the evidence that can be marshalled), and then considers what, to him, are controlling constitutional objections to this legislation, and particularly in its Minnesota form. Mr. Brown's elaborate attack really reduces itself to a conception as to the limitations of the Fourteenth Amendment which the Supreme Court of the United States in its recent decisions has refused to set. Our author discusses decisions like the *Muller Case* (208 U. S. 412) and *Noble State Bank v. Haskell* (219 U. S. 104) with a meticulous accuracy of the specific facts of the cases but one which quite dwarfs the underlying constitutional attitude of the court. The Supreme Court, in effect, has said that the Constitution does not throw upon the Court the duty of deciding between contesting economic and social claims that may be urged with plausibility in regard to practically every piece of legislation. What the Constitution does is to leave a large margin for legislative experimentation. That is precisely one of the reasons for the existence of a legislature, — to gain social knowledge through experience by using an invention like the minimum wage, which has as much accredited hope behind it as that proposal has. Does Mr. Brown really think that it is constitutional to create administrative machinery, such as is devised by the Massachusetts Minimum Wage Law, in order to ascertain the necessary cost of healthful living for laborers, to make public such a finding, and to bring upon employers the coercive influence of publicity; but that it is unconstitutional to go one further step and enforce by legal means such a finding, at the pain of compelling an industry to go out of business which is not sufficiently efficient to pay its employees enough to sustain them in health? Does Mr. Brown really think that the state has not an interest in the fact that more than sixty per cent of women employed in a given industry are employed at a wage below six dollars a week, when necessary human subsistence cannot be had at less than eight dollars a week, — an interest, that is to say, which rises to the legislative level?

The truth is, Mr. Brown thinks such a situation must be met exclusively by different forms of state interference (see pp. 22-26); the legislatures which have passed the minimum wage laws think otherwise. Mr. Brown thinks there is

an absolute "thou-shalt-not" against trying the experiment. He thinks so because he is permeated, despite his concessions, by certain economic theories which no longer have the absolute sway that he thinks they have. His pages are full of talk about "natural" and "inexorable" laws of supply and demand. The present economic and social thinking and action are less sure that the long-established is necessarily the inexorable. In this economic controversy Mr. Brown is asking our courts to take sides. To the extent that he thinks the Constitution incorporates any specific economic theory, to this extent he would make of the Constitution a more temporal and more partisan document than it is. If his point of view prevailed, "a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper ubique et ab omnibus*." (Mr. Justice Holmes, in *Otis v. Parker*, 187 U. S. 606, 609). Fortunately a larger view of the Constitution is prevailing. So far as constitutional law is concerned, at all events, we are getting away from the notion that the commandments were given to Moses at Manchester.

F. F.

OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY. Edited by Paul Vinogradoff. Vol. IV. The History of Contract in Early English Equity. By W. T. Barbour. The Abbey of Saint-Bertin and Its Neighborhood, 900-1350. By G. W. Coopland. Oxford: The Clarendon Press. 1914. pp. vii. 236, 166.

The first of these two essays furnishes the legal contribution to the fourth volume of Professor Vinogradoff's series. Herein Professor Barbour discusses the history of contract in chancery in the fifteenth century, based on an original investigation in the petitions to the chancellor in the Public Record Office. This discussion is preceded by a brief review of contract at common law. He has, of course, not been able to examine the some 300,000 petitions and cases from Richard II. to the early years of Henry VIII., but has made a judicious selection and has printed a number of them in the appendix. The treatment consists of a careful classification of the instances in contract in which the chancellor took jurisdiction. The classification of the petitions is as follows: Petitions brought in chancery despite the existence of a remedy at common law in theory; relating to obligations under seal; for the recovery of debts; for the recovery of personal property; against vendors of chattels; against vendors of lands; marriage settlements; partnership; agency; guarantee and indemnity; general. His generalization, stated with some hesitancy, is that the chancellor did not confine his jurisdiction in enforcing parol agreements to cases where there was a tort to the plaintiff or unjust enrichment of the defendant, as Professor Ames has suggested. Rather, the chancellor asked whether the promisor had made such a promise as in reason and conscience he ought to perform. A bare promise was perhaps not enough without more. His inquiry was whether the enforcement of the promise would further some general interest. Herein the attitude was the reverse of the contemporary common law, which looked primarily at the promisee and compelled him to show facts amounting to a deceit.

That the chancellor acted with a very free hand in granting early petitions in accordance with a good conscience, is clear from the calendars and early reports. Petitions were fashioned for widely different reasons; compare the petition in *Dodd v. Browning* (1 Cal. Proc. Chan. xiii., Temp. Henry V.), where the petitioner asked for relief as an old servant of the chancellor. Relief granted

must have varied greatly with each chancellor. "Equity is according to the conscience of him that is chancellor, and as that is larger or narrower so is equity."¹ Many carefully collected precedents brought to light by Professor Barbour demonstrate this; as well as the very difficulties which he has confessedly met in framing any generalization to show a systematic equity jurisdiction in the fifteenth century. It is a gain to the study of legal history that so thorough an investigator as Professor Barbour has found time to explore the mass of early chancery proceedings and bring to light so much unpublished material.

Mr. Coopland has traced in the second essay, which furnishes the economic contribution to the Studies, the details of the advent of peasant colonists in a district of Northern France with its center at St. Omer, just south of Calais and Dunkirk, and the process by which they gradually acquired holdings almost amounting to ownership. The chief value of the investigation consists in the exact data upon which the generalizations are based. The labor has been performed just in time. It is unlikely that in the future this region will yield much fruit for patient and careful investigators of the exact basis of economic theory such as Mr. Coopland.

J. W.

CRIMINOLOGY. By Baron Raffaele Garofalo. Translated from the first Italian and the fifth French editions. By Robert W. Millar. Boston: Little, Brown and Company. 1914. pp. xl, 478.

This entire book may be summed up as an attempt to make the form of repression fit the criminal. It is the criminal, not his act, that threatens society. The deed is but evidence of the character of the doer who is the real danger, and whom society must suppress. The ideas of punishment, of public vengeance, of intimidation of others, — these, though important, are subordinate to the idea of social necessity. Nor is the danger measured by the moral responsibility of the criminal, as is assumed by the present law. Indeed, since all criminals are but the product of heredity and environment, a logical application of this test would empty our penitentiaries. The real problem is to assort the criminals according to the dangers they represent. To this task Garofalo brings the great practical experience that he has obtained as lawyer, prosecutor, judge, and lawmaker. The first two classes are the insane, and the legal or conventional offenders. These are, theoretically, easy to distinguish, and, presumably, easily disposed of. Garofalo's greatest contribution is the third class, the natural criminal.

The natural criminal is a moral delinquent, marked by a partial or total absence of those usual feelings of pity for the suffering of others, or respect for their property. Garofalo has no patience with the sick-man theory, or the fallen-angel theory. Natural criminals are not normal men afflicted by disease in the literal sense, nor are they, like the Pirates of Penzance, "good men who have gone wrong." It is impossible for Mr. Hyde to be also Dr. Jekyll. He is an anomaly of nature, and society must pursue nature's own remedy, — elimination. But since even natural criminals vary in their degrees of inadaptability, the means of repressing them must also vary. In a draft of an international penal code which Garofalo submits, he suggests such means as the deprivation of rights, interment in over-seas penal colonies, marooning, and the death penalty. He also recommends compensation to the victim and compulsory labor to insure it.

¹ Selden, Table Talk; Equity.

Such, in brief, are Garofalo's ideas. We may not acquiesce in all his contentions, we may even wonder how many of us, if subjected to powerful temptation, would escape the brand of Mr. Hyde. Yet we cannot but feel that his division into natural and legal criminals has a sound basis. So felt even the old strict lawyers with their *malum in se* and *malum prohibitum*. For them, however, the distinction was chiefly a source of intellectual delight, without practical effect in any field but Agency. To Garofalo the difference means a fundamental change in the treatment of criminals.

The treatment itself, however, is more limited than the book's title indicates. Like most positivistic treatises, Garofalo's plan is suggestive of a garbage system, a method of carting off the filth after it has accumulated. The immediate need of this is great, and it is of capital importance as a preventive measure. But the book contains only incidental references to those social forces that produce the criminal or mould his ancestry. Within its scope, however, the book is an excellent introduction to criminology. Written by a lawyer, it makes an especially good beginning for lawyers and law students. It reads easily, due to the translator's success in expressing the author's thought rather than his language. Its moderate tone and practical nature make it good preparation for the audacious theorizing of Lombroso and the brilliant ingenuity of Tarde.

H. B. E.

WORKMEN'S COMPENSATION AND STATE INSURANCE LAW. By Harry B. Bradbury. Second Edition. In two volumes. New York: Banks Law Publishing Company. 1914. pp. lxxxii, 2476.

This work consists of two parts, of approximately equal length. The first part is a systematic treatise, and the second gives in full the text of the statutes. The treatise begins with an introductory chapter covering the theory and history of workmen's compensation acts, and then passes to a discussion of the more important questions to which the acts have given rise, — among others, the abolition of the old defenses, the persons to whom the acts apply, the manner of electing to profit by the acts, what injuries "arise out of" and "in the course of" the employment, the liability for injuries to workmen of contractors and sub-contractors, medical attention, funeral expenses, death benefits, disability benefits, wages as the basis of compensation, and procedure. As to each topic, the plan is to discuss the matter generally, then state decisions, and then indicate briefly the various statutory provisions. The decisions include those of the courts and those of industrial commissions and the like. Where procedure is dealt with, forms are given. In short, the treatise part of the work bears in mind throughout the needs of the practitioner. The other part presents in full the federal workmen's compensation acts, the workmen's compensation acts of the several states, the workmen's compensation acts of the several Canadian provinces, the British workmen's compensation act of 1906 and national insurance act of 1911, and the German workmen's insurance code of 1913. Thus for either practical or scholarly purposes the collection of texts furnishes a substantial basis. The work attempts to include all amendments up to January 1, 1914; and in several instances it contains matter of a still later date. The plan, as has been indicated, includes the features most useful to a practitioner or to a member of a commission charged with framing or administering a compensation law; and the plan has been carried out with a care that inspires confidence. Although the work is prepared for practitioners or for persons having a special interest, the introductory chapter should prove attractive to any student of law.

E. W.

GOOD WILL, TRADE-MARKS, AND UNFAIR TRADING. By Edward S. Rogers. Chicago: A. W. Shaw Company. 1914. pp. 288.

"Good will is that which makes to-morrow's business more than an accident. It is the reasonable expectation of future patronage based on past satisfactory dealings."

The first twelve chapters, introduced in this way, give sound counsel on choosing and acquiring those devices which make good will by "helping the public to identify your product,"—trade-marks, trade-names, trade-dress. Speculation where ideas are capital is naturally an alluring subject, which is here treated with sympathy, and with good sense as well.

The rest of the book is on "Defending a business from unfair competition." This, too, is lively reading, brightened by frequent pictures of the mark infringed and the mark infringing, printed side by side. "It is not a law book," says the preface. It is published with the declared purpose of helping to minimize infringement; and the author is so impatient of anything that suggests unfairness or imperils an established good will that he has to stop, now and then, and admit that the courts have not come so far. Where this occurs, notably in discussing cases of alleged infringement by a man's use of his own surname, and cases of agreements designed to restrict price-cutting, the treatment is not such as to win the mind of a lawyer who has read the decisions of the United States Supreme Court on these subjects. But as a guide book through trade's fairyland, showing the paths that lead to that pot of gold, good will, the work deserves all praise.

A. R. C.

MANUAL OF FEDERAL PROCEDURE. By Charles C. Montgomery, B.A., LL.B. San Francisco: Bancroft-Whitney Company. 1914. pp. viii, 1057.

In this work the author has given to the practitioner in one small volume a handy guide to the rules and forms of procedure in the federal courts. The book is no more than it purports to be, a manual, and hence of small interest to the student; but its convenient arrangement and workable index, together with its handy bulk, make it a valuable ready reference work for office and court room. It includes many forms, with suggestions as to the steps to be taken in the ordinary law, equity, or criminal case, which should be of considerable value to the young practitioner.

Besides a well-arranged manual of procedure, with copious citations of authority and quotations from the new Judicial Code, other statutes on procedure, and court rules, the book contains in an appendix the full text of the Judicial Code, together with numerous statutes on procedure not included in the new code, as well as the rules of the Supreme Court, the Circuit Courts of Appeals, and the new federal equity rules, all carefully indexed.

THE CRIMINAL JUSTICE ADMINISTRATION ACT, 1914. By Neville Anderson. London: Stevens and Haynes. 1914. pp. 126.

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STATE LEGISLATION UNDER THE WEBB-KENYON ACT

IN the disputed zone between the police power of the state and federal authority over interstate commerce, there have been few questions of greater importance than that in regard to the regulation of intoxicating liquors. A solution of the difficulty was attempted by Congress in 1890, when it passed the Wilson Act,¹ thereby hoping to make more effective, legislation enacted by the states under their exclusive power to regulate manufacture and sale, but inoperative until shipments from without a state had reached the consignees and the original packages had been broken.² The force of the federal statute, however, was seriously lessened when the Supreme Court of the United States held that the words "upon arrival" in the Wilson Act referred not to state lines, but to the consignee, and that importations could not be interfered with until they reached the persons for whom intended.³ A campaign by the prohibition interests for further federal action was immediately begun, but success was not had until the early

¹ Act of Aug. 8, 1890, 26 Stat. at L. 313. It provided that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state, . . . shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

² *Leisy v. Hardin*, 135 U. S. 100 (1890).

³ *Rhodes v. Iowa*, 170 U. S. 412 (1898).

part of 1913, when Congress passed the so-called Webb-Kenyon Act, which prohibits interstate shipments of liquor intended to be used in violation of the law of destination, the theory being that the states may constitutionally interfere with what is not lawful interstate commerce, and there will be no federal impediment to the enforcement of their local regulations.⁴

The constitutional questions involved in the Webb-Kenyon Act itself have been discussed at length.⁵ Several of the state courts, moreover, have justified the law (although on varying theories),⁶ and while the issues have not been passed upon by the Supreme Court of the United States, little doubt exists, I take it, that the decision there will be favorable. The difficult questions will arise when the attempt is made to determine just what local regulations are valid, and the state courts, in the several cases which have come before them, seem to have had considerable difficulty in resting their decisions on rational principles. In fact, it does not appear that the legislation thus far passed is very well adapted to operate under the federal statute.

When congressional committees were holding hearings on the Webb-Kenyon Bill, its advocates were not very explicit in explaining just how they expected the police power of the states to be made more effective.⁷ But it was perhaps the following that they chiefly had in mind: under search and seizure proceedings, intoxicating liquors intended to be used in violation of the law may, in

⁴ Act of March 1, 1913, 37 Stat. at L. 699. It provides that the transportation of intoxicating liquor between the states, "which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

⁵ See the veto message of President Taft and the opinion of Attorney-General Wickersham, 63d Congress, 1st Sess., Sen. Doc. 103; my paper, "The Constitutionality of the Webb-Kenyon Bill," Cal. L. Rev., September, 1913; A. H. Kerr, "The Webb Act," Yale L. J., June, 1913; W. T. Denison, "States' Rights and the Webb-Kenyon Liquor Law," Col. L. Rev., April, 1914; and the valuable notes, 26 HARV. L. REV. 78 and 533, and 27 HARV. L. REV. 763.

⁶ See, *inter alia*, State v. Grier and State v. U. S. Express Co., *infra*.

⁷ See Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 62d Congress, 2d Sess. (particularly the argument of F. S. Caldwell, pp. 130 ff.), and Hearings before the Committee on the Judiciary (Subcommittee III), House of Representatives, 62d Congress, 2d Sess.

several of the states, be declared a nuisance and destroyed.⁸ Up to March 1, 1913, these proceedings were impossible as applied to interstate shipments, since any interference with the liquor before it completed its journey and reached the consignee was an interference with valid interstate commerce. Now, however, liquors may be seized, in certain cases, before reaching the consignee, if the state by appropriate enactment so permits, and there can be no valid objection that a federal right is involved: if the liquor is declared a nuisance, it will be because intended for an unlawful purpose and the Webb-Kenyon Act will apply; if not a nuisance, the courts will so judge on the basis of lawful intent, which will make the proceedings an interference with legitimate interstate commerce. There would seem, then, to be little difficulty in this method of enforcement, since, if sufficiently large quantities of liquor are shipped into dry territory, it is manifest that the law is to be violated. But many of the states have no legislation of this character, and, furthermore, declaring the liquor a nuisance is not a penal proceeding. Hence in some jurisdictions difficulty has been experienced in justifying legislation under the Webb-Kenyon Act.

For example, the Delaware Court of General Sessions and the Supreme Court of Delaware differ as to the interpretation of the so-called Hazel Law⁹ regulating the shipment, carrying, and delivery of liquors in local-option territory. The portion of the law called into question made it unlawful for any common carrier or liquor dealer to take into dry territory any spirituous liquor, under penalty for conviction, and the same inhibition was extended to any person bringing more than one gallon within twenty-four hours into local-option territory from any point within the state. In the first case under the law the defendant was a Philadelphia liquor dealer who took some liquor across the state line into local-option territory for the personal use of the consignee. The Court of General Sessions held that:

" . . . as the defendant was interested in the liquor, for the carrying of which he was indicted, and the same was intended by him when received

⁸ This is the case, for example, in South Carolina. See "Laws of the Various States Relating to Intoxicating Liquors," compiled for the use of the House Committee on the Judiciary, 1913, p. 383.

⁹ Act of April 8, 1913 (27 Del. Laws, c. 139).

to be carried from the state of Pennsylvania into local-option territory in the state of Delaware, that the Webb-Kenyon Act does apply, the said liquor being received, possessed, or used by the defendant in violation of the law of this state. Even though the liquor was received in another state, its possession, as well as the intention with which it was originally received, continued until delivery was made in Delaware."¹⁰

If it had been established that the sale took place in Delaware, was prohibited by law, and was not valid as being a part of legitimate interstate commerce, the decision would have rested on different grounds; but the court went so far as to say that:

"... the carrying of liquor by a liquor dealer from one state into local-option territory of another state, for a purpose not in itself unlawful, is within the prohibition of the Webb-Kenyon Law, when the carrying or delivery of liquor into such territory is prohibited by the laws of the destination state."

But in *Van Winkle v. State*¹¹ the Delaware Supreme Court took the opposite view and declared the Hazel Law inoperative so far as it applied to interstate shipments for valid purposes.

The latter, it seems to me, is the correct ruling. The Hazel Law prohibits all importations into local-option territory, regardless of intent to violate state enactments, and is thus broader than the Webb-Kenyon Act. It would be competent, however, for the state to pass legislation similar to the federal statute and penalize the importation of intoxicants with unlawful intent. If the Webb-Kenyon Law is constitutional, then penal legislation to the same effect is within the power of the state. And if, in the Delaware cases, the consignments had been destined to be sold by the consignees in violation of valid local laws, the Webb-Kenyon Act would have applied; but the Hazel Law, directed at all interstate shipments, certainly valid before Congress acted on March 1, 1913, is void so far as it interferes with the freedom of commerce between the states and cannot be sustained as an exercise of a state's increased powers of police, unless there is illegal intent under a law which the local legislature has the power to enact. This is the view which was adopted in considerable measure by the Ken-

¹⁰ *State v. Grier*, 88 Atl. 579 (Delaware, Court of General Sessions, 1913).

¹¹ 91 Atl. 385 (Delaware, Supreme Court, 1914).

tucky Court of Appeals when it considered a statute of very similar tenor.¹²

In *Louisville & Nashville R. R. Co. v. Cook*,¹³ the Supreme Court of the United States held inoperative, when attempted to be applied to interstate shipments, a statute of Kentucky prohibiting the introduction into local-option territory of intoxicating liquors, with a few exceptions.¹⁴ This, however, the Kentucky Court of Appeals said, did not prevent the statute from "becoming operative to a transaction withdrawn from the protection of the commerce clause by the Webb-Kenyon Act," and the carrier would therefore be "liable when it delivers liquor in a local-option territory to one who intends to use it in violation of the law of the state." The facts showed that the liquor was intended for personal consumption, a lawful use under the state law, and so the statute which was validated under the Webb-Kenyon Act did not apply.

The mistake of the Delaware Court of General Sessions seems also to have been made by the Supreme Court of Mississippi.¹⁵ The legislature of that state passed a law, certain portions of which followed the Webb-Kenyon Act very closely, and made it illegal to ship into the state any intoxicating liquor to be sold or possessed "either in the original package, or otherwise in violation of any law of this state now in force or hereafter to be enacted." The importation in small quantities for personal use was permitted, but, as the state court held, the net result of the statute was to make it "unlawful for any person to order and have shipped to him, or for him to receive, from without the state, intoxicating liquors in quantities in excess of one gallon." In this case the shipment was in excess of one gallon, and the court considered it "clearly within the terms of the Webb-Kenyon Act, as a mere inspection thereof will demonstrate, for it [the act] expressly divests intoxicating liquor of its interstate character when it is intended, by any person interested therein, to be received in violation of the laws of the state into which it is being transported."

Counsel contended that the liquors shipped were not "intended

¹² *Adams Express Co. v. Commonwealth*, 157 S. W. 908 (Kentucky, 1913).

¹³ 223 U. S. 70 (1912).

¹⁴ A number of state statutes make immaterial exceptions in regard to druggists, etc., but these I do not need to consider.

¹⁵ *Adams Express Co. v. Beer*, 65 So. 575 (Mississippi, 1914).

to be sold or used in violation of any law of the state," and therefore that the Webb-Kenyon Act did not apply. (In this case also the liquors were for personal consumption.) But this contention, if valid, the court said, would have the effect of taking the word "received" from the Webb-Kenyon Law, or "interpolating between the words 'received' and 'possessed' the words 'for the purpose of being,'" and this would make the act read: "Which liquor is intended by any person interested therein to be [received] *for the purpose of being* possessed, sold or in any manner used . . . in violation of any laws of any such state." This amendment the court declined to make.

The question is thus raised as to the meaning of the word "received." Acceptance by the consignee of a shipment from without the state is undoubtedly a part of interstate commerce, but may it be made a crime when possession is lawful? In other words, does the Webb-Kenyon Act so enlarge the powers of the states that they can exclude intoxicating liquors from their borders by making it a crime for the consignee to receive interstate shipments? If the state has such a power, two facts are evident: (1) there has been a delegation of legislative power over interstate commerce, since before the passage of the federal law the states could not interfere with the "receiving" of shipments from without their borders, although they could regulate the possession and sale; and (2) the intent, which is the *sine qua non* for the Webb-Kenyon Act to operate, becomes unlawful under a state statute which would be invalid as oppressing interstate commerce, had not the Webb-Kenyon Law been passed.

In the first case the law, so far as the word "received" is concerned, would be an unconstitutional delegation of legislative power, and the second interpretation would be absurd, — a perfect example of reasoning in a circle, — since an intent to violate unconstitutional regulations would make the Webb-Kenyon Act apply in order to validate these very regulations. An intent to violate laws which the states have not the power to pass is not sufficient to make the Webb-Kenyon Act operate; in other words, the Mississippi court's interpretation would have the federal law make possible state enactments before the conditions for its own application were complied with. It follows, therefore, that state laws like the one in Mississippi must remain unconstitutional

so far as interstate commerce is concerned. Apart from this, the purpose of Congress was simply to enable the states to enforce their already valid local laws, although in order to do this they would make procedural regulations, previously invalid, but possible when applied to what is not properly interstate commerce.

It must be concluded, therefore, that the word "received" is surplusage, except perhaps in one case: where the state forbids possession. Then, if a shipment were received from without the state, its acceptance would be such a part of, and so mingled with, the criminal possession that it would be competent for the local authorities to punish the consignee for receiving the liquors: the acceptance and possession would be practically the same act. But even this (which is a novel situation and has not come before the courts) would be possible irrespective of the Webb-Kenyon Law. Our conclusion is, therefore, that the Mississippi court was in error when it held that the state had the power to punish a consignee for "receiving" interstate shipments.

Two other sections of the Mississippi act came before the court incidentally. The first compelled the carrier to keep a record of every consignment of intoxicating liquor and to file with the clerk of the circuit court of the consignee's county his name, that of the consignor, the amount and kind of liquor delivered. A second section forbade delivery to other than the *bonâ fide* consignee or, in case of sickness, his agent with written authorization. The carrier was also required to make the consignee sign a statement giving the use for which the liquors were intended, and promising that there would be no violation of the law. The court held this latter section "clearly within the provisions of the Webb-Kenyon Act," since the conditions were "only such as must be complied with by the consignee before it becomes lawful for him to receive the liquor." But, as the foregoing argument of this paper has attempted to make clear, the Webb-Kenyon Act sanctions nothing of the kind; such legislation must be justified under the general police power of the state.

This was the attitude taken by the Supreme Court of Tennessee in *Palmer v. Southern Express Company*.¹⁶ The court held that an act of the legislature (subsequent to the Webb-Kenyon Law)

¹⁶ 165 S. W. 236 (Tennessee, 1914).

"forbidding any interstate carrier of intoxicating liquor to deliver liquor to the consignee, unless the latter delivers a statement giving his name and address and stating the use for which the liquor was ordered, directly interferes with interstate commerce as imposing a condition precedent on the exercise by the carrier of the right to make delivery of an interstate shipment, and on the right of the consignee to receive delivery, and cannot be sustained as an exercise of the police power, or as authorized by the Wilson Act, which subjects liquor to state regulation, but which does not apply before actual delivery to the consignee." Under the facts of this case the shipment was intended for a lawful use, the possession of the liquors was not forbidden, and the Webb-Kenyon Act did not apply.

A question of somewhat different character was raised in Idaho.¹⁷ There the law, passed in 1909, made it a crime for any person or corporation within the state to accept for shipment to anyone in prohibition territory, "except as may be authorized by this act or the interstate commerce law of the United States." A carrier promulgated the rule that shipments from without the state should be governed by the same rules as intrastate shipments, and the Federal District Court refused to issue a mandamus compelling the carrier to accept liquors for shipment from points without the state to points within the prohibition districts. But it would seem that here also the court erred, the analogy to the Kentucky law being tolerably close: the regulations were valid as to intrastate commerce, but invalid as to interstate commerce; and in order to make the Webb-Kenyon Act apply there must be the intent to violate a local law. This was not present; hence, it is submitted, the mandamus should have been issued.

Three other state courts, however, seem to have reasoned correctly with regard to local legislation under the federal statute. In Alabama the so-called Fuller Law makes illegal all shipments of intoxicating liquors within the state, except to druggists, etc., and declares that its provisions shall be construed so as not to conflict with "that clause of the Constitution of the United States which confers upon the Congress of the United States the power to regulate commerce." A proper construction of these provisions,

¹⁷ United States *ex rel.* Zimmerman v. Oregon-Washington R. & N. Co., 210 Fed. 378 (1913).

together with those relating to manufacture and sale, said the Alabama Supreme Court, "must lead to the conclusion that it was the purpose of the legislature in that bill to declare that it should be unlawful for any person to have in his possession, or to deliver to any other person at any point in the state, liquors not within interstate protection and which were intended for unlawful use."¹⁸ By the Webb-Kenyon Act, however, this interstate protection is removed, and so the court concluded:

"When, therefore, a common carrier in this state is possessed of liquor for delivery to a person who intends to put it to an illegal purpose, such common carrier itself violates the law of the state and becomes amenable to the state laws for such violation, unless, indeed, it is without knowledge as to the unlawful purposes of the consignee."

This, it is submitted, was a correct ruling.

Even simpler facts were involved in a Kansas case. A carload of beer was shipped from St. Louis, Missouri, to Corona, Kansas. On the arrival of the car it was placed on a siding where the liquor, before delivery to the consignee and before the original package was broken, was seized by the sheriff. The brewing company answered to notices of seizure and claimed the beer, but it was shown that the beer was destined for an unlawful purpose; under the Webb-Kenyon Act it was not legitimate interstate commerce, and the authority of the state could attach before the acceptance by the consignee or the breaking of the original package.¹⁹

In an Iowa case, also, there was clear intent to violate valid local regulations prohibiting the manufacture, sale, or keeping for sale of intoxicating liquors. Common carriers are forbidden to transport to consignees not holding permits to sell under the state law, and this applies to shipments with intent to violate the law against sale, etc. Under the Webb-Kenyon Law, therefore, the court issued an injunction to restrain an express company from bringing in and distributing such liquors. The law under which this relief was secured was inoperative as applied to interstate commerce before the act of Congress, but the court held that no reenactment was necessary.²⁰

This, however, was not the view of the Supreme Court of South

¹⁸ *Southern Express Co. v. State*, 66 So. 115 (Alabama, 1914).

¹⁹ *State v. Doe et al.*, 139 Pac. 1169 (Kansas, 1914).

²⁰ *State v. U. S. Express Co.*, 145 N. W. 451 (Iowa, 1914).

Carolina.²¹ Parts of the South Carolina "dispensary law were unconstitutional in so far as they attempted to prohibit the importation of liquor from another state for personal use, at the time of their adoption." The court held that "the removal of the constitutional objections to such statutes by the enactment of the Webb-Kenyon Act did not give them force and effect by operation of law, nor can they be validated by subsequent statute, since an unconstitutional statute is utterly void," but since the passage of the Webb-Kenyon Act "the legislature has the power to adopt a statute with provisions similar to those in the dispensary law, held unconstitutional prior to that enactment." It is settled, however, that no reënactment of inoperative state laws will be required.

The constitutionality of the Wilson Act²² was considered by the Supreme Court of the United States on these facts: the petitioner (for a writ of *habeas corpus*) was arrested on the ninth of August, 1890, charged with selling imported liquor contrary to the laws of Kansas. The Wilson Act had gone into effect the day before, and the Supreme Court held that "the petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the state, upon the implication arising from the want of action on the part of Congress up to that time." Prior to the passage of the Wilson Act, the police regulations of Kansas in respect to intoxicating liquors did not control imported articles until after the original package had been broken. The court said:

"[The state legislation attacked in *Leisy v. Hardin*,²³] as construed to apply to importations into the state from without, and to permit the seizure of the articles before they had by sale or other transmutation become a part of the common mass of property of the state, was repugnant [to the commerce clause] in that it could not be given operation without bringing it into collision with the implied exercise of a power exclusively confided to the General Government. This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state."

²¹ *Atkinson v. Southern Express Co.*, 78 S. E. 516 (South Carolina, 1913).

²² *In re Rahrer*, 140 U. S. 545 (1891).

²³ *Supra*.

And the present case is not one "of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which would not operate upon articles occupying a certain situation until the passage of the act of Congress. The act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reënactment of the state law was required before it could have the effect upon imported, which it had always had upon domestic, property."²⁴

If the Supreme Court of the United States upholds the Webb-Kenyon Law, it will undoubtedly follow this ruling under the Wilson Act, and so the South Carolina court was in error. The proper construction was adopted by the Iowa and Kentucky courts, the latter holding that the state statute, which was inoperative as applied to interstate commerce, became operative when the commerce was with intent to violate the law. States, therefore, will not be compelled to reënact their regulations.

From the survey which has been made of the cases already decided, it is evident that, in order for the Webb-Kenyon Act to apply, there must be intent to violate a previously valid state law. Disregard of this has led to erroneous conclusions, particularly in the opinion of the Mississippi court.²⁵ If the enactments making the intent unlawful are constitutional, irrespective of the Webb-Kenyon Act, the state is empowered under the federal statute to take proceedings hitherto impossible.

It would seem, however, that in order to make their prohibition regulations completely effective, the states will be compelled to forbid the possession of more than small quantities of intoxicating liquors for personal use, with perhaps a few exceptions, — licensed druggists, for example. Such legislation would not be designed to interfere with personal consumption or the liberty of the individual, but would simply make more difficult the evasion of laws whose validity is beyond question. While the state courts have differed as to the constitutionality of such action,²⁶ there is little doubt, I think, that under the decisions of the Supreme Court of the United

²⁴ *In re Rahrer*, *supra*, pp. 563, 565.

²⁵ *Adams Express Co. v. Beer*, *supra*.

²⁶ *Black on Intoxicating Liquors*, § 38; *Edge v. Bessemer*, 164 Ala. 599, 51 So. 246, 26 L. R. A. N. S. 394 and n. (1909); 24 L. R. A. N. S. 172 and n.

States, the states have the power to make criminal the possession of more than a specified quantity of intoxicants.²⁷

In addition to this, the states should provide for search and seizure proceedings to condemn shipments in excess of the permitted amount as soon as they cross state lines. The intent to violate local regulations would be clear; under the Webb-Kenyon Act the shipments would not be valid interstate commerce, and the states could thus exclude all consignments of liquor except in small quantities for personal use.

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²⁷ See the language of Mr. Justice Harlan, *Mugler v. Kansas*, 123 U. S. 623, 662 (1887); Freund, *Police Power*, §§ 453-455.

CONSTRUCTIVE TRUSTS BASED ON PROMISES MADE TO SECURE BEQUESTS, DEVISES, OR INTESTATE SUCCESSION

EQUITY has long exercised jurisdiction to enforce a constructive trust (1) against a legatee who secured, or prevented the revocation of, his bequest, (2) against a devisee who obtained, or prevented the revocation of, his devise, and (3) against an heir, who persuaded an ancestor to refrain from making a will or to revoke a will already made and refrain from making a new one, by the giving of an oral promise to apply for others in ways promised some or all of the property thus obtained, and who, in violation of his promise, claims the property for himself. In *Chamberlaine v. Chamberlaine*,¹ decided in 1678, in making a devisee pay certain sums, which he had agreed to pay in consideration of the testator's forbearing to alter his will so as to give the sums as legacies, Lord Chancellor Finch, afterwards Lord Nottingham, said it was "the constant course of this court to make such decrees upon promises made that the testator would not alter his will." If the judge who introduced the bill for the Statute of Frauds in the House of Lords, a statute which was a wills statute as well as one calling for written evidence of various contracts, could treat this jurisdiction of chancery as a matter of course, as he did treat it, only a few months after the passage of the Statute of Frauds, it would seem as if we ought not to have any difficulty with it. Unfortunately, however, American courts fail to agree in their answers to the fundamental question whether the promisor who is sought to be charged as trustee must have had at the time he made his promise an intent not to keep it, and this failure to agree on that essential matter makes it important to examine the cases critically. It will be well to set out the general principles first and then to collate the authorities.

A. GENERAL PRINCIPLES

It is, of course, true that the statutes relating to wills, to descent, and to distribution are to be observed by the courts. Moreover,

¹ 2 Freem. Ch. 34 (1678).

whether or not chancery judges are strictly bound by those provisions of the Statute of Frauds which do not expressly, as the trust provisions do, apply to things equitable, they have always accepted the statute, except so far as the part-performance-specific-performance doctrine, or some phases of the doctrine of the reformation of written instruments or of the doctrine of estoppel may be deemed a partial rejection, and except so far as such judges may have been too liberal in finding constructive or resulting trusts. Hence any discussion of the doctrine of chancery as to constructive trusts enforced for breach of oral agreements as to the disposition of property which was bequeathed or devised to, or inherited by, the promisors, solely because of their promises, may well begin with the consideration of what is essential to the observance of the statutes as to wills, and be followed by a similar discussion as to the Statute of Frauds.

Incorporation into a will by reference and non-testamentary subsequent definition of legacies and devises. — By the statutes as to wills a method of executing wills and testaments is provided, and no instrument can properly be given effect as a will which does not meet those requirements. In most jurisdictions the document executed as a will may by appropriate reference incorporate into itself, and so make part of itself as a will, a writing existing at the time the will is executed;² but in a few jurisdictions incorporation by reference of papers, not executed in the way wills or codicils are required to be, is allowed only for the purpose "of identifying the object or subject of a bequest [or devise] actually made and denoted in a will."³ In no jurisdiction may a testator in an executed will reserve to himself the right to supply names or amounts of gifts, or otherwise determine testamentary dispositions, by a subsequent writing not executed with the formalities required in the case of a will or codicil. The reason is that such names or such amounts of gifts cannot be supplied in such a way without the act of supplying them being essentially testamentary. In writing the names and amounts the writer is making no immediate dis-

² 1 Jarman on Wills, 6 Eng. ed., pp. 135-138; Gardner on Wills, pp. 44-51; Page on Wills, pp. 183-190.

³ Hatheway v. Smith, 79 Conn. 506, 521, 65 Atl. 1058, 1063 (1907); Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238 (1891); *In re Emmons' Will*, 110 N. Y. App. Div. 701, 96 N. Y. Supp. 506 (1906).

position of the property, but is deliberately supplying information of his intentions as to the disposition to be made of his property at his death, and his writing, which in no respect differs from an attempted will or codicil, must necessarily be ineffective unless executed in the manner required in the case of wills and codicils. The subsequent memorandum is in all essentials an attempted codicil and must be executed in the way in which in the given jurisdictions codicils are required to be executed, or else it must fail to have any effect.⁴

But when the foregoing is said, not all is said that needs to be. A testator may put in his duly executed will provisions which may be given a different application, and therefore be made to constitute in a sense a different property disposition, by events which happen after the execution of the will. For instance, a trust to dispose of property and divide the proceeds among those who should be the testatrix's partners at the time of her death, or to whom she might have disposed of her business, was held to be good in favor of those to whom the testatrix did dispose of her business.⁵ So it has been held that a gift in a will of all one's property to the person who shall furnish the maker of the will at the maker's request with support may be claimed by one who meets the conditions after the execution of the will.⁶ In each case the subsequent act of volition of the testator, which results in the designation of the person to take under the will, is performed for other than testamentary reasons, and hence the designation is not fairly to be called testamentary. As was said by Lord Chancellor Cottenham in the case of the trust for those to whom the testatrix should dispose of her business:

"In the present case the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but

⁴ "Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself would, it is obvious, tend to introduce all the evils against which the Statute of Frauds [as a wills statute] was directed, and indeed give to the will an operation, in the testator's lifetime, contrary to the fundamental law of the instrument." 1 *Jarman on Wills*, 6 Eng. ed., p. 133.

⁵ *Stubbs v. Sargon*, 3 Myl. & C. 507 (1838).

⁶ *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631 (1897).

such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time — many contingent devises — all shifting clauses — are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will and gives his own estate to such one of his sons as shall not be the appointee of the other estate — or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete, that is, the disposition is complete — the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death — to such children as he might have — or to such servant as he might have in his service at his death.”⁷

Gifts causa mortis. — Not only may some unattested volitional acts of the testator subsequent to the will be allowed to determine the identity of persons to take under a will or the amounts they may take, but some *quasi*-testamentary acts, — such as gifts *causa mortis*, where delivery takes the place of the execution of a will, — may even enable essentially testamentary dispositions to be effected without compliance with the statutes governing wills. To be sure the delivery, actual or symbolic as the case may be, marks a gift

⁷ *Stubbs v. Sargon*, *supra*, 511–512. With reference to a direction in the will that advancements subsequently made and charged in testator's books or papers be deducted from legacies, see *In re Moore*, 61 N. J. Eq. 616, 47 Atl. 731 (1900); *Langdon v. Astor's Heirs*, 16 N. Y. 1 (1857); *Robert v. Corning*, 89 N. Y. 225 (1882); *Harris v. Harris's Estate*, 82 Vt. 199, 72 Atl. 912 (1909). For such a direction to be effective, advancements must in fact have been made. *Langdon v. Astor's Heirs*, *supra* (*semble*); *Hoak v. Hoak*, 5 Watts (Pa.) 80 (1836). To the extent that they have not been made, the subsequent writing is necessarily testamentary in intent and nature.

causa mortis off from a strict testamentary disposition,⁸ but the revocable nature of the gift makes that distinction very slight, and in those jurisdictions where the title to the thing delivered as a gift *causa mortis* does not pass until the donor dies,⁹ the distinction becomes microscopic. Nevertheless the distinction is well established.

Contracts to bequeath or to devise or to die intestate. — Another *inter vivos* transaction which closely resembles a testamentary disposition is a binding contract to bequeath or to devise property other than that furnished, or to be furnished, as a consideration to the promisor. Such a contract is either unilateral (the act or property being actually given for the prospective testator's promise) or is bilateral (mutual promises); but whether it is unilateral or bilateral, the contract resembles a gift *causa mortis* in that a prejudicial step, — the making of the contract, — is taken at once. It is, however, really much less testamentary in semblance than is a gift *causa mortis* because a contract is not revocable by the act of one party alone, whereas a gift *causa mortis* is revocable by the donor. If the contract is to devise land and the Statute of Frauds has been complied with,¹⁰ or if part performance

⁸ "A gift *causa mortis* resembles a testamentary disposition of property in this: that it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but in its essential characteristics is what its name indicates — a gift. Actual delivery by the donor in his lifetime is necessary to its validity, or if the nature of the property is such that it is not susceptible of corporeal delivery, the means of possession of it must be delivered." Smith, J., in *Emery v. Clough*, 63 N. H. 552, 554, 4 Atl. 796, 798 (1885).

⁹ *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641 (1895).

¹⁰ It is generally held that an oral contract to devise land is within § 4 of the Statute of Frauds. See cases collected in 5 Am. & Eng. Ann. Cas. 495, n.

Whether an oral contract to bequeath personal property is within § 17 is not so clear. In *Wellington v. Apthorp*, 145 Mass. 69, 73, 13 N. E. 10, 12 (1887), C. Allen, J.; for the court, said of a contract to bequeath money:

"Nor is it contended that a contract to leave a certain amount of money by will to a particular person, though oral, is open to objection under the Statute of Frauds. It is not a contract for the sale of lands or of goods; and it may be performed within a year. . . . Such a contract differs essentially from a contract to devise all one's property, real and personal, which comes within the Statute of Frauds. *Gould v. Mansfield*, 103 Mass. 408."

The Massachusetts statute mentioned in note 16, *post*, was passed after *Wellington v. Apthorp* was decided.

But while a contract to bequeath money is not within § 17 of the Statute of Frauds, it has been intimated that a contract to bequeath specific personal property is within

by the prospective devisee has taken place, chancery will give appropriate relief to the promisee of the contract to bequeath or to devise or to the beneficiary of that contract.

Chancery will not, of course, supply a will where one was not executed, nor supply a bequest or devise contracted for but not inserted in the will actually executed; but in the case of a contract to devise, if the provisions of the Statute of Frauds other than those relating to wills furnish no obstacle, it will make the person who succeeds to the property hold for, and convey to, the promisee or the beneficiary of the promise. There was less reason for equity to interfere to declare and enforce an equity where the contract was for a bequest as distinguished from a devise, as ordinarily a money judgment against the executor or administrator for breach of contract would be adequate relief; but as chancery early took jurisdiction of the administration of estates,¹¹ and as an incident to that jurisdiction entered decrees for money payment on claims against estates, chancery quite naturally came to speak of an equity where the contract called for a bequest of specific chattels and, even where the contract was for a pecuniary legacy, gave appropriate relief on the theory of an equity in the promisee.¹²

that section. See *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757 (1899). In that case there was a mutual will contract between an aunt and a niece followed by the execution of the mutual wills and the age of the aunt was such, the legacy was so large, and the wills remained executed so long before the niece revoked hers that in the view of the court the niece had received free what amounted to a considerable insurance on the aunt's life. The court therefore held that it would be fraudulent for the niece's executor to plead the statute, and that therefore the oral contract for the making of mutual wills was taken out of § 17 of the Statute of Frauds. See also *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666 (1885).

¹¹ "Already in Elizabeth's day a legatee, instead of going to the ecclesiastical court, will sometimes file a bill in chancery; by this time the ecclesiastical courts have grown too feeble to protect themselves. It may be that the cases in which the Chancery first interfered were cases in which the legatee was not a mere legatee, but was also a *cestui que trust*. But at any rate the Court of Chancery soon became the regular court for actions by legatees. Then again the creditor had often an occasion to go thither. He had no specialty, or no specialty that bound the testator's heir, and the testator's personal estate was inadequate for the payment of his debts; on the other hand the testator, being an honest man, had devised his real estate to X. and Y. upon trust to pay his debts. Here the creditor wanted the aid of a court of equity, because he wanted to enforce a trust. Thus in one way and another the court obtained a footing in the field and gradually it subdued the whole province of administration." Maitland's *Equity and the Forms of Action*, 193.

¹² See *Ridley v. Ridley*, 34 Beav. 478 (1865).

In the United States, where we do not have the old general administration bill,

It is difficult to name and classify the relationship recognized and enforced in these contract-to-will and contract-to-die-intestate cases, where equity takes jurisdiction, for the courts often use specific-performance-of-contract language and often use trust language. Take, for instance, a case where, because of the Statute of Wills and of section four of the Statute of Frauds, the express contract cannot be recovered upon at law.¹³ The complainant having complied with equity's requirement of part performance, what is the nature of his recovery in chancery? The situation is different from the ordinary specific-performance situation, for in that ordinary situation chancery originally compelled the execution and delivery of the particular conveyance contracted for, as, indeed, it will so compel to-day in the case of a contract for real estate in a

or equivalent chancery jurisdiction, it is probably true everywhere that equity will not give a remedy on these contracts unless the legal remedy is inadequate.

In *Day v. Washburn*, 76 N. H. 203, 81 Atl. 474 (1911), where, in violation of testatrix's promise to bequeath all her property to plaintiff, she left certain items of personal property of considerable value to two of the defendants, equity jurisdiction was rested on the ground that while "a decree for specific performance would have precisely the same effect as a judgment for damages in a suit at law," yet, as the administrator with the will annexed had been made a party defendant, the bill would be treated as if he had brought a bill to compel the other parties to interplead.

In *Kundinger v. Kundinger*, 150 Mich. 630, 114 N. W. 408 (1908), a complainant who had secured a divorce from the testator for his adultery and had refrained from bringing legal proceedings to procure alimony, on the testator's promise that if she would so refrain he would take care of her and provide by will for her support, was allowed what the court called "specific performance" against the trustee to whom testator had left his property in trust for others. That was on the ground that while complainant might have filed a claim in the Probate Court and recovered damages for breach of contract, — citing *In re McNamara's Estate*, 148 Mich. 346, 11 N. W. 1066 (1907), — that was not an adequate remedy, as she was entitled to have the support come to her as needed and "no provision in dollars and cents could quite as efficiently meet this requirement" as could the proper equity decree. Cf. *Riley v. Allen*, 54 N. J. Eq. 495, 35 Atl. 654 (1896).

¹³ Most of the specific-performance-of-contract-to-bequeath-or-devise cases that get into the reports are part-performance-of-oral-contract cases, and quite frequently they are cases involving the troublesome question of whether the rendition of personal services not capable of reasonably definite and satisfactory pecuniary valuation will suffice as part performance. For late cases of that kind see *Brasch v. Reeves*, 124 Minn. 114, 144 N. W. 744 (1913) and *Smith v. Cameron* (Kan.) 141 Pac. 596 (1914). See a note on such cases in 44 L. R. A. N. S. 733. Compare the Statute-of-Frauds cases cited in the notes in 15 L. R. A. N. S. 466 and 38 L. R. A. N. S. 752. On the right to specific performance or injunction during the lifetime of the one who has conveyed or is about to convey property in violation of his agreement to leave the same at his death to complainant, see *Newman v. French*, 138 Ia. 482, 116 N. W. 468 (1908) and note in 18 L. R. A. N. S. 218.

sister state or a strictly foreign jurisdiction, while no court will compel the execution and probate of an instrument to serve as the will of the deceased. The situation is also different from that of the customary constructive trust, for the recovery is not measured by the enrichment which the deceased, and through him his heirs, next of kin, devisees, or legatees, have derived from the promisee, but instead is measured by what was promised in exchange for that enrichment. It would seem as if the situation is essentially one of specific performance,¹⁴ but as if, as an aid to clear thinking, it is worth while to discriminate the juridical act in such a case from ordinary specific performance by adopting for it the phrase "*quasi-specific performance*."¹⁵ On this *quasi-specific-performance* theory, then, relief in equity will be given in the contract-to-devise cases where the contract is in writing, or, if it is oral, comes within the part-performance doctrine,¹⁶ provided that to give such *quasi-*

¹⁴ In *Bolman v. Overall*, 80 Ala. 451, 455, 2 So. 624, 626 (1886), Somerville, J., said of a contract to leave property by will:

"The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance." While the court did also use language denoting the trust theory, many courts consider specifically performable contracts only a separately named species of trusts.

And in *Burdine v. Burdine's Executor*, 98 Va. 515, 519, 36 S. E. 992, 993 (1900), Buchanan, J., said:

"Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be."

See a note on "Specific Performance of Contract to Make Will" in 31 Ann. Cas. (1914 A), 399.

¹⁵ That new name should also be applied to the enforcement of a contract in equity against the vendor's grantee with notice or without value (see *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16 (1914)), and indeed to its enforcement against anybody but a party to the contract.

¹⁶ Whether the Massachusetts statute which provides that "No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the person whose executor or administrator is sought to be charged, or by some person by him duly authorized" (1 Rev. Laws, Mass., 1901, ch. 74, § 6, p. 655) is subject to the part-performance doctrine is not clear from its language, but probably it is not subject to it. See *Emery v. Burbank*, 163 Mass. 326, 39 N. E. 1026 (1895). Neither is it clear whether the statute applies except where legal or equitable relief is sought against the executor or administrator.

specific performance would not work unjustifiable hardship and oppression.¹⁷

But if, on the other hand, the case is not in fact one for *quasi*-specific performance, but instead is one for the application of trust principles, the trust, being enforced against some one other than the promisor, must be some species of constructive trust. If constructive-trust principles are to be applied, equity should say to the defendant: "You must either reimburse the complainant to the extent that his services, or the other consideration furnished, enriched the deceased, and through him enriched you, or else you must hand over the property promised complainant by the deceased. You must elect which you will do."

The reason for such an election is that a constructive trust is enforced merely because the express promise is not to be performed and because, on that account only, unjust enrichment would take place if a trust were not enforced. If the defendant is willing to perform, even though his performance is tardy, he should be permitted to do so and no constructive trust be enforced. But often in the contract to will cases equity will not want to give the defendant any election because it will not be just to give him one, — in most cases he ought to be made to perform and should not be allowed to rescind, — so it seems more satisfactory on the whole to treat the situation as one of a contract coming under the part-performance doctrine and therefore *quasi*-specifically enforceable in equity, though not literally specifically enforceable.¹⁸

Where an equity is sought to be enforced against the heirs, next of kin, devisees, or legatees, the executor or administrator is not "sought to be charged." The executor was sought to be charged in *Emery v. Burbank*, *supra*.

For a vigorous protest against a too ready acceptance of the claims of one who seeks to recover on an oral contract to devise, see *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118 (1903).

¹⁷ On that proviso, see *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710 (1896); *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832 (1901); *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903 (1903).

¹⁸ While equity can refuse to give *quasi*-specific enforcement where to give it would lead to unfortunately harsh results to the promisor's surviving family, the law courts have not, of course, any power to withhold the legal remedy for such a reason. If the contract is not in writing and the Statute of Frauds applies, the law courts escape any difficulty by confining the plaintiff to a *quasi*-contract recovery; but where the contract is evidenced in a writing which is signed by the party to be charged and which otherwise complies with the requirements of the Statute of Frauds, or where the contract is oral and the Statute of Frauds does not apply, the law courts must assess

Contracts for joint, mutual, or joint and mutual wills.—The species of contract to bequeath or to devise which results in a

damages measured by the value of the property contracted for. *Frost v. Tarr*, 53 Ind. 390 (1876). It is a pity that the law courts did not refuse to enforce any of these contracts, because it is often unfair to enforce them and yet law courts cannot discriminate. It is too bad that the law courts did not confine relief at law to a *quantum meruit* recovery; for the flexibility of equitable relief and equity's sound discretionary award or refusal of its remedies make it more possible for equity than for the law courts to deal satisfactorily with the situation. Compare *Owens v. McNally*, *supra*, where the plaintiff was denied relief in equity on a contract for all the estate of the deceased because of hardship on the deceased's widow, who was entitled to one-half the deceased's estate and who did not learn of the contract till after her husband's death, but where it would seem chancery might have given plaintiff the half of the estate to which, under the California statute of succession, apparently, the widow had no claim, if plaintiff preferred that to a *quasi*-contract recovery. In *Burdine v. Burdine*, *supra*, the contract was on record at the time of the marriage, so the widow was deemed not to be able to show hardship. Cf. *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878 (1912), where no hardship was shown. If in *Owens v. McNally*, *supra*, the contract had been in writing and recovery had been sought on it at law, the court of law would have been hard put to it to keep plaintiff from getting a judgment for the full money value of the estate,—see *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345 (1888), where a claim for breach of a contract to devise one-half of an estate was enforced,—and such a judgment might have left the widow of the deceased penniless.

In *Gall v. Gall*, 64 Hun (N. Y.) 600, 19 N. Y. Supp. 332 (1892), in dismissing a complaint for specific performance, the judges advanced as an extra reason for their decision the illegality, as against his wife, or wife and children, of a man's agreement to will all his property to a third person. Barrett, J., for himself and also, it seems, for O'Brien, J., said (p. 606): "The parties, whatever their original understanding, could never have contemplated a restriction upon the decedent's right to marry or to provide for his children in case such marriage was fruitful. Nor could they have contemplated the taking, by the plaintiff, of the decedent's entire estate to the exclusion of any such future wife or child. If such an agreement had been made, it certainly would have been against public policy and void. Whatever agreement was made was necessarily subject to such possibilities and was limited by implication accordingly."

And Van Brunt, P. J., said (p. 607):

"I do not think that the courts will enforce a contract whereby a party deprives himself of all power to bequeath or devise, by will, the property of which he is the owner at death, except in cases of adoption, where the contract is made for the benefit of an infant, and not to the exclusion of children."

That General Term decision was affirmed without opinion in 138 N. Y. 675, 34 N. E. 515 (1893). There is nothing *contra* in *Heath v. Heath*, 18 Misc. (N. Y.) 521, 42 N. Y. Supp. 1087 (1896), where the promise was expressly subject to the dower and distributive personal property interest of promisor's widow, nor in *Hall v. Gilman*, 77 N. Y. App. Div. 458, 79 N. Y. Supp. 303 (1902), or *Winne v. Winne*, *supra*, because in neither of the latter cases was there wife or child.

On the validity of contracts to devise all of one's property, see an article by Mr. Joseph H. Drake in 7 Mich. L. Rev. 318. The difficulty of all who deal with the enforcement of such contracts is to find a way to uphold them in general and yet to deny

joint will, or in a joint and mutual will, or in mutual wills calls for special reference.¹⁹ It was only gradually that a joint and mutual will met with judicial favor,²⁰ and even to-day the weight of authority is against the probate of a joint will executed on the condition expressed in it that it is not to be effective as a will, or is not to be probated, until the death of the last surviving testator who executes it.²¹ The difficulty with a joint or joint and mutual

recovery, or to apportion it, in extreme cases. While it is true that equity may refuse specific performance, if it has jurisdiction, or give it only on equitable terms, that action of equity is not adequate protection in this country in many cases because of our rule of full damages at law.

¹⁹ A joint or conjoint will may be defined to be one executed by joint owners of property, or one executed jointly by the owners of separate property who treat the property bequeathed or devised or both, as joint for will purposes and accordingly leave it to the same beneficiary or beneficiaries. *In re Cawley's Estate*, 136 Pa. St. 628, 20 Atl. 567 (1890); *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216 (1909). In *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 399, 74 Atl. 703, 705 (1909), however, the phrase "joint will" is made to apply only where the property bequeathed or devised in the same document is held jointly, and the phrase "mutual will" is suggested as proper where the property is held separately, *i. e.*, is owned in severalty.

A mutual or reciprocal or counter will, as it is variously called, is a will executed by two or more testators who own separate property or separate interests in the same property, and who make gifts to the survivor or survivors of them. "A mutual will is . . . in effect two [or more] wills, the disposition of each sharer being applicable to his or her half [or other share] of the joint property." Sir Robert P. Collier in *Dias v. De Livera*, L. R. 5. A. C. 123, 136 (1879). The same judge in *Denysen v. Mostert*, L. R. 4. P. C. 236, 252 (1872), spoke of mutual wills as being in England "of rare occurrence." Where the reciprocal provisions are contained in separate wills executed by the several testators, the plural terms "mutual wills," "reciprocal wills," "counter wills," and "twin wills" are used.

A joint and mutual will is strictly a will executed by two or more testators and containing both reciprocal provisions and a gift to some third person beneficiary or beneficiaries.

A double will is a will executed by two or more testators who have no joint property to dispose of, who reserve full separate rights of revocation, and who have only sentimental reasons for desiring to execute one document instead of separate wills. *In re Cawley's Estate*, *supra*.

²⁰ The prejudice against unconditional joint wills which made some courts refuse to admit such a will to probate either as the joint will of both parties or as the separate will of each (see *Walker v. Walker*, 14 Oh. St. 157 (1862), and *Clayton v. Liverman*, 2 Dev. & Bat. Law (N. C.) 558 (1837)) has practically disappeared. See *Betts v. Harper*, 39 Oh. St. 639 (1884); *In re Davis' Will*, 120 N. C. 9, 26 S. E. 636 (1897). See also *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, 437 (1891); *Baker v. Syfritt*, 147 Ia. 49, 54, 125 N. W. 998, 1000 (1910).

²¹ See *Hershy v. Clark*, 35 Ark. 17 (1879); *State Bank v. Bliss*, 67 Conn. 317, 35 Atl. 255 (1896). In the latter case it was held that the estate of the first to die must be administered and distributed as intestate estate. In *In re Raine*, 1 Swab. & Tr.

will conditioned in that way seems to be that many courts cannot understand how a will can be a will unless it takes effect as such *eo instanti* the testator dies and unless it can be probated promptly after his death.²² And with reference to a joint and mutual will there is a further difficulty due to loose language; for a number of courts say that such a will is essentially irrevocable by the survivor,²³ and yet they are unable to get away from the fact that a will by its very nature must remain ambulatory, and hence revocable in the proper way by a competent testator. The real truth of the matter is that such joint and mutual wills, like separate mutual wills, retain the quality of revocability, and if they are revoked, must be denied probate;²⁴ but equity interferes to prevent

144, 146 (1858), in holding that the will, that of two brothers, could not be probated during the life of the survivor because all the gifts were to take effect "after both our decease," Sir C. Cresswell called the will "a very singular instrument." As an executor was appointed unconditionally, it would seem that probate might have been granted. In *Peoria Humane Society v. McMurtrie*, 229 Ill. 519, 82 N. E. 319 (1907), the will, so far as it was joint, was expressly conditioned to take effect as the will of both testators, if when both should be dead no individual will had been made, and, since the will as to the one who died first had been revoked by his marriage and was not republished by his subsequent individual will, the court properly refused probate of the joint and mutual will after the death of the survivor when it was offered as the latter's will. No opinion was expressed as to the validity of such a will.

In *Schumaker v. Schmidt*, 44 Ala. 454, 467 (1870), a joint will conditioned not to take effect until the death of the surviving testator is favored in a *dictum*. There B. F. Saffold, J., for the court said:

"The best summary of the law . . . is that two or more persons may execute a joint will, which will operate as if executed separately by each, and will be entitled to, and will require a separate probate upon the decease of each, as his will. But if the will so provides, and the disposition of the property requires it, the probate should be delayed until the death of both, or all, of the testators."

And see *Baker v. Syfritt*, *supra*; *In re Lovegrove*, 2 Swab. & Tr. 453 (1862).

"But delicate and important questions in this connection remain unanswered; as, for instance, how the first decedent's estate shall meantime be settled and disposed of, and whether a title can in any sense devolve under his will." Schouler, *Wills and Administration* (1910), § 459.

²² See *Hershy v. Clark*, *supra*, 23, where it is said that "A will must take effect at the death of the testator, and not at a time still in the future."

²³ See *Frazier v. Patterson*, *supra*, 85. In *Stone v. Hoskins* [1905] P. D. 194, 197, the same thing was said of such a will in case the survivor accepts the provision in his favor made by the deceased. But see *Walker v. Gaskill*, 83 L. J. R. (P. D.) 152 (1914).

²⁴ A court of probate will either probate a will or deny it probate, regardless of the contract of the maker of the will, unless the contract is also a revoking will, executed as such, or else, as a contract, contains in itself an express revocation of the will which

the injustice of having the testator receive and enjoy property left to him solely because of his promise and then successfully violate on his part the contract under which he, as the survivor, was bound to let his will stand unrevoked.

Equity does not compel the probate of the revoked will, and the court of probate, uncompelled, neither would nor could probate

meets the statutory requirements for a revocation in writing. *Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699 (1893); *Sumner v. Crane*, 155 Mass. 483, 29 N. E. 1151 (1892); *In re Keep's Will*, 2 N. Y. Supp. 750 (1888); *In re Gloucester's Estate*, 11 N. Y. Supp. 899 (1890); *Houck v. Anderson*, 14 Ariz. 502, 131 Pac. 975 (1913); *Wyche v. Clapp*, 43 Tex. 543 (1875); *Hobson v. Blackburn*, 1 Add. Eccl. 274 (1822); *Pohlman v. Untzellman*, 2 Lee Eccl. 319 (1757); *Walker v. Gaskill*, 83 L. J. R. (P. D.) 152 (1914). Cf. *Everdell v. Hill*, 27 Misc. (N. Y.) 285, 58 N. Y. Supp. 447 (1899). See notes in 27 L. R. A. N. S. 508; 37 L. R. A. N. S. 1196; 12 Prob. Rep. Ann. 63, 71, 72.

While *Breathitt v. Whittaker*, 8 B. Mon. (Ky.) 530 (1848), is supposed to deny the revocability of a joint will, the decision is really one in the law of powers. The will was a joint one in the exercise of a joint power, and it was held that as both donees had to unite in the exercise of the power both had to concur in revoking the ambulatory exercise of the power in the joint will.

In *Ex parte Day*, 1 Bradf. (N. Y.) 476 (1851), Bradford, Surrogate, said:

"An agreement to make mutual wills appears to be valid, and, after the death of either of the parties, irrevocable. . . . This curious subject is admirably discussed in Mr. Hargrave's luminous opinion in the Walpole case [*Lord Walpole v. Lord Orford*, 3 Ves. Jr. 401 (1797)]. It is there conceded, as was indeed established at law in the same case (7 D. & E. 138), that the effect of such an agreement could not be to make a will of that kind irrevocable, for from the very nature of the transaction testamentary dispositions are revocable. But it was contended a compact of that kind could be enforced in equity against the estate of the defaulting party after his decease, on the ground of an attaching equitable trust."

In *Robinson v. Mandell*, 3 Cliff. 169, 20 Fed. 1027, No. 11,959 (1868), Clifford, Circuit Justice, said (p. 1033):

"Where two persons agree each with the other to make mutual wills, and both execute the agreement, it is held that neither can properly revoke his will without giving notice to the other of such revocation. The death of one of the parties in such a case carries his part of the contract into execution, and the better opinion perhaps is that the other party, after that event, if the agreement was definite and satisfactory, cannot rescind the contract. *Dufour v. Pereira*, 1 Dick. Ch. 419; 2 Harg. Jurid. Arg. 272. Both wills, it is agreed, even in a case when the agreement between the respective testators is fully proved, are still in their nature revocable; but the doctrine is, that the parties are under a restriction, each to the other, not to revoke their respective wills so as to secure any undue advantage."

The statement by Clifford, J., quoted *supra*, that neither party to mutual wills can revoke without giving notice to the other, was based on Lord Camden's opinion in *Dufour v. Pereira*, 1 Dick. Ch. 419 (1769), and needs to be qualified even as an equity doctrine. In *Stone v. Hoskins*, *supra*, it is held that notice obtained by ascertaining that the other party has died without performing is enough if the survivor, after getting that notice, is able to alter his or her will also.

it. What equity does is to make the party who, because of the revocation, gets that for which he pays nothing, hold in trust for and convey to the party who would have taken under the will if it had remained unrevoked. It is sometimes said that the will is irrevocable in equity,²⁵ but the meaning of that simply is that while equity knows that the will has been revoked, it will nevertheless decree that the property shall be held for those who would have taken if the will had not been revoked.²⁶

With reference to contracts to bequeath or to devise, whether they are mutual-will contracts or not, it should be noted that the remedy on such contracts is not confined to equity, and indeed exists in equity in the United States only if the legal remedy is in-

²⁵ See *Brown v. Webster*, 90 Neb. 591, 603, 134 N. W. 185, 190 (1912).

²⁶ *Dufour v. Pereira*, *supra*; *Bower v. Daniel*, 198 Mo. 289, 35 S. W. 347 (1906). See *Baker v. Syfritt*, *supra*. But see *Allen v. Bromberg*, 163 Ala. 620, 50 So. 884 (1909) (Statute of Frauds not complied with).

For mutual wills, whether they are joint or several, to be irrevocable in the eyes of equity they must have been executed in pursuance of a contract, and not merely as a coincidence of the unrestrained intentions of the testators. *Lord Walpole v. Lord Orford*, *supra*; *Coveney v. Conlin*, 20 App. D. C. 303 (1902); *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898); *Albery v. Sessions*, 2 Oh. N. P. 237 (1895); *Coghlin v. Coghlin*, 26 Oh. C. C. 18 (1904); *Buchanan v. Anderson*, 70 S. C. 454, 50 S. E. 12 (1905). The proof of such a contract must be clear. *Wangea v. Marr*, 165 S. W. 1027 (Mo., 1914).

In *Drishler v. Van Den Henden*, 49 N. Y. Super. Ct. 508 (1883), where pretermitted heirs were seeking to recover from their mother their share of their father's estate against the mother's claim of a mutual will arrangement between her and the deceased, *Ingraham, J.*, said (p. 511):

"The fact that at the time of the execution of the will in question the defendant made a will leaving all her property to the testator, does not of itself make the wills mutual wills. In order to make a mutual will, the instrument or instruments must be executed by both parties under an agreement to make such disposition of the property of each, that the survivor will be entitled to the property of the one first dying, or the disposition of the property must be in the instrument executed by both of the parties." The last "or" clause should have been omitted to make the statement perfectly accurate. That the contract need not be proved by express language, however, see *Everdell v. Hill*, *supra*, reversed on other grounds in 58 N. Y. App. Div. 151, 68 N. Y. Supp. 719 (1901), and appeal dismissed in 170 N. Y. 581, 63 N. E. 1116 (1902).

The execution of wills by the parties to an oral contract to make mutual wills is not such part performance as to take the contract out of the Statute of Frauds. *McClanahan v. McClanahan*, 77 Wash. 479, 137 Pac. 479 (1913); *Edwall v. Jessep*, 75 Wash. 391, 134 Pac. 1041 (1913). But see *Brown v. Webster*, *supra*, where in the majority opinion it was deemed that the wills were executed as "an integral and important part of the contract" and that "the execution of the wills satisfied the Statute of Frauds," though in a specially concurring opinion one judge refused to say more

adequate.²⁷ If the contract is in writing, as required by the Statute of Frauds, its breach will justify a claim against the estate or, where the local statutes permit, an action at law will lie on it.²⁸ Wherever the sole beneficiary of a contract may sue upon it, the third person who by the contract was to receive a legacy or devise may present a claim against the promisor's estate or sue for the contract's breach.

What has been said about contracts to bequeath or to devise is in general applicable to contracts to die intestate. If the contracts meet the statutory requirements, claims against the estate of the deceased promisor for the breach of such contracts will be upheld or actions at law for their breach will lie, and, if the legal remedy is not adequate, suits in equity may be maintained. A contract to die intestate cannot literally be enforced specifically at the suit of the heir or next of kin with whom the ancestor made it, but if the ancestor, in breach of his promise, has died testate and by his will left the property or part of it to others, equity will enforce an equity in favor of the promisee,²⁹ *i. e.*, will give him *quasi*-specific performance.

Bequests, devises, or intestacies secured by oral or unattested written promises to apply for others some or all of the property so obtained.

— The foregoing observations prepare the way for the consideration of the cases of devises, bequests, or intestacy obtained by the recipient's oral or unattested written promises. The contract-to-bequeath-or-devise cases, which we have just been considering, where the person contracting to bequeath or to devise does not carry out the contract are, naturally, much like the cases where there is a bequest or devise given in consideration of the promise of the recipient to devote the property to specified uses. In the

than that the wills *might* "furnish written evidence to take the oral contract without the Statute of Frauds."

²⁷ See n. 12, *ante*.

²⁸ *Wellington v. Apthorp*, *supra*; *Jenkins v. Stetson*, 9 Allen (Mass.) 128 (1864); *Carroll v. Swift*, 10 Ind. App. 170, 37 N. E. 1061 (1894). In *Burgess v. Burgess*, 109 Pa. St. 312, 316, 1 Atl. 167, 168 (1885), Clark, J., said:

"A contract to devise may in some instances be enforced by decree for specific execution — *Brinker v. Brinker*, 7 Barr. (Pa.) 53 (1847) — or it may furnish ground for an action, in case of a breach, and the damages will be computed according to the same measure, as if the action were for breach of a contract to convey."

Cf. Riley v. Allen, *supra*, 503.

²⁹ *Jones v. Abbott*, 228 Ill. 34, 81 N. E. 791 (1907). *Cf. Taylor v. Mitchell*, 87 Pa. St. 518 (1878).

latter cases, however, while there is often a contract in form, it is perhaps doubtful whether there is a contract in fact.

In the usual case of a devise or legacy on an oral promise the testator says, in effect: "If I make you devisee or legatee in the will which I am about to make, or if I do not revoke the devise or legacy I have provided for you in the will which I have made (and I reserve the right to do as I please in the matter), will you hold the property in trust for so and so [or pay or convey such and such part of it to so and so]"; and the prospective devisee or legatee expressly or by conduct answers that he will. If a contract is to result from that kind of conversation, which at least gives the illusion of a contract, it must be on the theory that the prospective devisee or legatee really makes an offer to perform, and that the testator accepts it by making his will in the devisee's or legatee's favor, by refraining from revoking it thereafter, and by dying. It is an offer of a unilateral contract not accepted until the testator dies with the will in the devisee's or legatee's favor unrevoked.

But a promise which cannot bind the promisor until the very fractional part of a second in which the promisee dies and his will becomes effective is at the best a peculiar thing, and is so like an acceptance of an offer of contract sent after the offeror's death that it may well be deemed in a common-law jurisdiction not to be enforceable as a contract. In some jurisdictions the promisor in these will and intestacy cases would be estopped to deny acceptance in time,³⁰ just as occasionally in other contract actions a promisor is deemed estopped to deny that there was consideration for his promise.³¹ Unless the estoppel theory is to be adopted, it would seem as if in these will or intestacy cases, where the person expected to make the will or to die intestate makes no promise and reserves entire freedom to change his mind, a common-law court cannot properly regard contracts as entered into; for in a common-law jurisdiction death cannot properly serve to mark the completion of the act of willing or forbearing to will which is to bind the promisor by a contract, since until the death of the testator or intestate the promisor is not bound and after his death there is no existing promisee to be bound to.

The problem is just the sort that would have delighted the

³⁰ See *McDowell v. McDowell*, 141 Ia. 286, 119 N. W. 702 (1909).

³¹ See *Ricketts v. Scothorn*, 57 Neb. 51, 77 N. W. 365 (1898).

medieval lawyer and that makes the modern lawyer and judge impatient, and were the result of the no-contract view to be a denial of any relief or even of adequate relief, to the beneficiary of the promise, all American common-law courts would doubtless adopt the estoppel view or qualify their view of the effect of death sufficiently to find a contract, as some have already come near doing, if not done.³² There is, however, sufficient relief furnished in

³² The cases where the beneficiary has insisted on a contract remedy are relatively few. The earliest seems to have been *Rookwood's Case*, Cro. Eliz. 164 (1590), the full report of which was as follows:

"Rookwood, having issue three sons, had an intent to charge his land with four pounds per annum to each of his two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to them duly the four pounds per annum; to which the two younger sons, being present, agreed; and he promised to them to pay it. And for non-payment after the death of the father, they brought an assumpsit. The whole court held clearly that it was well brought and that it was a good consideration; for otherwise his land had been charged with the rents."

The promise by the father should doubtless be interpreted as a promise not to charge by deed or will, *i. e.*, to let the lands go to the heir by descent uncharged.

The case of *Dutton v. Poole*, Vent. 318, 2 Lev. 210 (1678), was one where a father, who was going to dispose of a wood to raise a portion for his daughter, refrained from doing so, and allowed the property to descend to his son and heir, on the promise of the latter to pay his sister £1000, and the daughter was allowed to recover in assumpsit against the son.

But the English courts in *Rookwood's Case* and *Dutton v. Poole* did not discuss the question whether there was a binding contract or not, but considered solely the question whether the plaintiffs were sufficiently parties to the contract, conceded in each case, to sue upon it. The nearness of the relationship of the beneficiary to the promisee and all that such nearness implied, — the supposed consideration of love and affection which led the promisee to exact the promise for the benefit of plaintiff and the supposed moral consideration found in the promisee's moral duty to provide for the plaintiff, — were deemed to justify a judgment for plaintiff. But *Dutton v. Poole* is no longer law in England and has not been law there since 1861, when the case of *Tweddle v. Atkinson*, 1 B. & S. 393, ended all controversy about the matter, and *Rookwood's Case* can be law there only if the fact that the younger sons were present and "agreed," made them parties to and not mere beneficiaries of the contract claimed, if one there was. See Wald's *Pollock on Contracts*, 3 ed., p. 241; *West Yorkshire Darracq Agency, Limited v. Coleridge* [1911] 2 K. B. 326.

Since in England even the sole beneficiary of a contract cannot sue on it, and mere nearness of relationship to the promisee, or moral consideration characterizing the beneficiary, no longer makes him a party to the contract or within its consideration, the beneficiary of an oral promise made to secure a legacy or devise can have no remedy there as such beneficiary, either at law or in equity, against the promisor. His sole remedy there is in equity as *cestui que trust* of a constructive trust.

In the United States, in most of which the sole beneficiary of a contract can sue upon it, the question of a right to sue at law in these legacy, devise, and intestacy cases seems seldom to have arisen. The reason probably is that nearly always the equity

chancery under its constructive-trust doctrine, the sounder view is that equity does not specifically or *quasi*-specifically enforce a

remedy is available and is so much more satisfactory than the legal. The theoretical difficulty of finding a contract does not seem to trouble the courts apart from the matter of consideration.

In *Parker v. Urie*, 21 Pa. St. 305 (1853), where a son died intestate in reliance on the promise of his father, who received the intestate's estate, to pay plaintiff \$500 out of the son's estate, the court thought that there was a contract which the father was "bound, in conscience and law, to fulfill," but yet recognized that to the time of his death the son had the right to change his mind and make a will cutting out the father. In that event, said Lewis, J., for the court, the promisor "would be relieved from the performance of his contract, not because there was no original consideration for it, but by reason of the failure of the consideration expected, and which formed the inducement to enter into the engagement."

But in *Parker v. Urie* the promisor, after the decease of the promisee and on his own deathbed, made to the beneficiary what the court deemed a valid oral partial assignment of a bond, the amount assigned being the amount which the assignor was to pay the beneficiary, and the defendants as executors had collected the whole bond; so on that theory of the case an action at law was clearly proper. Any tenable theory to support the case may be adopted, because the action was an amicable one, "the case to be tried without regard to the form of action or the proper joinder of parties."

In *Gaullaher v. Gaullaher*, 5 Watts (Pa.) 200 (1836), it was held that a legatee who, in order to prevent the alteration of testator's will in plaintiff's favor, had agreed to give the plaintiff the legatee's notes for \$5,000 and to pay the notes, and who actually had given the notes, could not successfully maintain the defense of no consideration. The court said that, if the legatee had not given the notes, chancery would have declared a trust, "and it would be strange if a moral obligation, sufficient to raise a trust, were not sufficient to sustain a promise." The merger of the equitable cause of action in the notes, *i. e.*, the discharge of that cause of action in those notes, was of course sufficient valuable consideration for them.

In *Williams v. Fitch*, 18 N. Y. 546 (1859), a count for money had and received was sustained at the suit of the beneficiary against the executor of the one who had made the promise in order to gain succession by the promisee's intestacy. The promisor was trustee of a fund for his daughter, and he not only made her the promise to hold the fund for the plaintiff, but after the intestacy of the daughter he held the fund for the plaintiff as the latter's property and loaned portions of it out in the plaintiff's name. That case was decided in 1859, and therefore after the reformed procedure introduced by the New York Code of Procedure of 1848 had been in operation for some years; but even as a common-law decision it could perhaps be justified on the ground that the promisor became a trustee of personalty for plaintiff and that "where the trust is fully executed and there remains nothing to be done but for the trustee to pay over the amount to the *cestui que trust*, an action at law may be maintained in all states for the payment of the amount found due." 2 *Perry on Trusts*, 6 ed., § 843.

In Illinois, under the influence of the moral consideration idea, an action at law was allowed in *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945 (1899), where the circumstances were much like those in *Rookwood's Case*, *supra*. A father, who had made his will mainly in favor of his son, called his son and daughter together and got the son to promise to pay his sister "\$1,500 not mentioned in my will." The court found

contract in such cases, but simply raises a constructive trust,—³³ and since the common-law court does not need to act, it should re-

the son's promise to be supported by the consideration of "the honesty and rectitude of the duty of compliance," and enforced it. The real consideration, if there was one, was the father's dying without altering his will in such a way as to give his daughter the \$1,500. The daughter, like the younger sons in *Rookwood's Case*, was either a party to the contract, if there was one, or else a sole beneficiary. The Illinois court, which is quite rigid about requiring in the constructive-trust-for-breach-of-oral-trust-or-promise will cases active solicitation on the part of the legatee or devisee, or actual fraudulent intent at the time of making the promise, or breach of some special confidential relationship, abandoned these tests when the question was one of recovery at law for breach of the promise. As Phillips, J., for the court said (178 Ill. 122, 129):

"To hold the son could not be required to comply with such promise as not being based on a sufficient consideration would be to disregard the fact that the will was merely ambulatory and could be changed by the testator so long as he was of sound and disposing mind, and that he must have known that fact, and would be, in effect, to aid the appellant in the perpetration of a fraud on appellee."

If the Illinois Supreme Court would only carry that fraudulent retention idea over into the trust cases, where it belongs, its decisions in those cases would no doubt become satisfactory. For equity to grant relief a contract does not have to be found, since unconscionable retention of property by the defendant is enough.

It should be noted that the common-law courts have modified their view of the effect of death sufficiently to find a contract between the testator and a legatee or devisee for the benefit of a third person where the will gives a specific legacy or a devise on the condition expressed in the will that the legatee or devisee shall pay a specified sum to the intended beneficiary. If the legatee or devisee accepts the gift provided in the will, he becomes personally liable to the intended beneficiary, who may sue at law and recover the full amount specified, even if it exceeds the value of the legacy or devise. See cases cited in Wald's *Pollock on Contracts*, 3 ed., p. 252, where Professor Williston points out that "even in England there are cases that have never been overruled in which a beneficiary was allowed to recover in an action of debt against a devisee whose devise was left upon the condition that he should make a payment to the beneficiary." On the personal liability of devisees for charges imposed by the will, see 129 Am. St. Rep. 1056, n.

³³ In *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233 (1907), where for various reasons equitable relief was not given, Emery, V. C., said (p. 462):

"This equitable remedy is not by way of specific performance of a contract, and a personal decree for performance and relief, based on such grounds, would seem clearly to disregard the express provisions of the statutes, both of frauds and wills. I have not been referred to, nor do I find, any case where relief was granted against the legatee in such cases, except by seizing, either in his hands or of those who held for him, the property devised or bequeathed to him for the purpose of impressing it with a trust." See also *Belknap v. Tillotson*, 82 N. J. Eq. 271, 88 Atl. 841 (1913).

For the same general reason it was held in *Winder v. Scholey*, 83 Oh. St. 204, 93 N. E. 1098 (1910), that a suit to enforce a trust against legatees, who obtained a bequest on the promise of one made for all before the will was executed, was not on a contract express or implied and so was not barred by the six-year Statute of Limita-

fuse to stretch its principles to find a contract which, if found, would be practically undistinguishable from an unattested will.

The ordinary contract to devise or to bequeath or to die intestate, whether the contract is unilateral or bilateral, is binding prior to the death of either contracting party and so cannot be confused with a will; but this peculiar unilateral contract, if it is a contract, has no existence prior to the testator's or intestate's death. It is as ambulatory as a will or as a gift *causa mortis*, but it lacks the delivery prerequisite to a gift *causa mortis*. There is, to be sure, one prejudicial *ante mortem* act in the case of a will made and allowed to become final in exchange for a promise, namely, the making of the will; but that ambulatory prejudicial act is exactly the one involved in the case of every will entitled to probate. If the court had to be asked to enforce the promise specifically, or even *quasi*-specifically, it might well refuse because of the close resemblance of the enforcement to the supplying of a will; but fortunately that difficulty may be avoided by refusing to ask the court to enforce the promise as such and by asking it, instead, to raise a constructive trust. In England, where the sole beneficiary of a contract, as such, cannot sue upon it, nothing but a constructive trust will serve to prevent the promisor's unjust enrichment.

Where an ancestor has died intestate, and refrained from making a will only because the heir or next of kin promised to carry out his testamentary wishes, there is the same difficulty of finding a contract *eo instanti* that the intestate dies that we found in the legacy and the devise cases. Moreover, there is a similar question whether the contract, if it were to be conceded to arise, would be

tions. The cause of action was held to be for relief on the ground of fraud and hence one which would not accrue until discovery of the fraud.

In *Golland v. Golland*, 84 N. Y. Misc. 299, 147 N. Y. Supp. 263 (1914), Cardozo, J., said (p. 267):

"The principle is now a settled one in this state that, where a devise is induced by the promise, express or implied, of the devisee, to devote the gift to a lawful purpose, a secret trust is created; and equity will compel him to apply the property in accordance with the promise by force of which he procured it. . . . A court of equity in such cases exerts its power, not merely because there has been a breach of contract, but because the promise has been used as an instrument to induce the promisee to part with his property, so that the retention of it by the promisor in violation of the promise would result in an unjust enrichment and would constitute a fraud. It is not the promise only, nor the breach only, but the promise and the breach combined, with the extortion of property from the owner upon the faith of the engagement, which puts the court in motion."

legally valid. The statutes of descent and distribution exhibit the state policy as to the descent and distribution of the property of intestates in the absence of a will, and a contract which does not spring into existence until the death of the intestate, and which is effective solely as a testamentary disposition, is perhaps too like an unattested will properly to be enforceable specifically or *quasi*-specifically. But a constructive trust may well be enforced to prevent unjust enrichment. In England, because the sole beneficiary of a contract cannot sue upon it either at law or in equity, nothing but a constructive trust will meet the needs of the situation.

We may conclude then, though the matter is far from being free from difficulty, that on principle bequests or devises obtained by promises made to the testators by the legatees or devisees, and intestacies brought about by promises made to the intestates by the heirs or next of kin, do not properly complete contracts for breach of which an action for damages or a bill for specific performance, or even a bill for *quasi*-specific performance, will lie. Some courts, however, deal with them as if they constitute contracts.³⁴

But even if they are not contracts, may not the promisors be estopped to deny that they are contracts? If there is such estoppel, and the view that there is has been advanced,³⁵ it is estoppel by

³⁴ See n. 32, *ante*. The fact of the matter would seem to be that, in these will and intestacy cases, the parties contemplate a unilateral arrangement, and if the legacy, devise, or intestacy which is to be the consideration for the promisor's obligation is not forthcoming, there never is an obligation binding on the promisor. On the other hand, if it is forthcoming, there is a clear equitable duty, but not one, on principle at least, enforceable at law.

³⁵ In *McDowell v. McDowell*, *supra*, a suit to establish and quiet title, the doctrine of estoppel was invoked to evade the defense that the Statute of Wills was not complied with and that the statutes of descent must govern. The case was one where a dying man told his wife and his mother that he desired his wife to have all his property, and his mother in reply to his question to her if that was all right told him that it was. In consequence he made no will, and in holding the mother estopped to claim under the statutes of descent, Deemer, J., for the court, said (p. 288):

"Unless our statutes of descent are to be regarded as absolute and as inflexible as the laws of the Medes and Persians, the facts recited should estop the defendant from claiming any interest in her son's estate. . . . The general rule announced by the decisions is that a property right, created in favor of one by an estoppel, is superior to the Statute of Frauds and the statutory provisions

promise, and that is a dubious kind of estoppel. Moreover, the estoppel theory does not make it any more advisable to allow an action at law; and since relief should be allowed only in equity, it would seem to be simpler and sounder to put the estoppel theory to one side and to adopt the constructive-trust theory, which the estoppel theory really cloaks.

It is not properly as a contracting party, nor as one estopped to deny that he contracted, but as a constructive trustee because of his unjust enrichment, that a legatee or devisee who got the property under the will, or an heir or next of kin who got it by intestate succession, solely by virtue of his promise, and now is keeping it as his own, while refusing to carry out his promise, is decreed against. In other words, the promise as such is not enforced and the will as such, or the intestate succession as such, is not interfered with, but there is what has been called "a secret trust" recognized and enforced by chancery because of the legatee's or devisee's or heir's or next of kin's fraudulent retention of the bequeathed or devised or unwilled property in repudiation of his promise.

In *Sweeting v. Sweeting*,³⁶ Sir R. T. Kindersley, V. C., thus stated the general trust doctrine where there is a devise on a secret trust:

"Now what does the term 'a secret trust' mean? It means that there has been a contract, agreement, or understanding between the testator and A. B. that, if the property is devised to A. B., he will treat it in a particular manner; and it is called a secret trust simply because it is not expressed in the will; not because no person knows of it, for it may have been arranged before fifty witnesses. It means that upon the face of the will, the devise being absolute, there is before the will something,

with reference to the execution of wills and conveyances of real estate and personal property."

And again (p. 290):

"This, as we have said, makes out a very clear case of estoppel. The foundation of this doctrine is equity and good conscience. And its object is to prevent the unconscientious and inequitable assertion and enforcement of claims or rights which might have existed or been enforced by other rules of law unless prevented by estoppel. In practical effect there is, from motives of equity and fair dealing, the creation and vesting of opposing rights in favor of the party who gets the benefit of the estoppel. *Horn v. Cole*, 51 N. H. 287."

The estoppel idea was doubtless back of the decision in *Lawrence v. Oglesby*, discussed in n. 32, *ante*.

³⁶ 10 Jur. N. S. 31, 32 (1864).

either *vivâ voce* or written, constituting an engagement on the part of the devisee not to avail himself of the devise, but to apply it in a particular manner.³⁷

"Supposing A. devised to B. in fee, and B. agreed to hold it for the benefit of C., C. cannot go into a court of law and claim to recover by ejectment; but he can come here and say, 'It is true that I cannot ask a court of equity to import into the will anything which is not in it, but it is against conscience of, and a breach of, that faith which is due between man and man, that his devisee, who accepted the devise upon an agreement for my benefit, should turn round and say, 'I am the owner, and there is nothing you can look at beyond the devise in the will in my favor.' ' The court of equity will attach a trust to the devisee as a consequence of his engagement with the testator; not because the testator intended the property to be so held. For if the testator, without any understanding with A. B., devised his estate to him, and expressed in writing, by a codicil not duly executed, that his intention in devising to A. B. was that he should hold the property for C. D., that would not enable C. D. to come here and say that A. B. was trustee for him. A. B. would be entitled to say, 'There is the will; if you bring parol evidence of the testator's intention to devise for the benefit of some one else, you are violating the Statute of Frauds and importing into the will that which is not therein.' The expression 'parol' means not merely that which is verbal, but it may mean 'written.' But no court, either of law or equity, can look out of the devise as to intention, unless an engagement or understanding can be made out on the part of the devisee to accept it on such a footing, or unless he was aware of the testator's intention, and either in words or tacitly accepted it."

The distinction between adding to the will and enforcing a secret trust is clear, even though the same practical consequences may follow from the latter as from the former. It is true, however, that the courts sometimes come very near reading into the will the unattested provisions found in the promise of the legatee or devisee. Perhaps the best illustration of that is found in the case of *In re*

³⁷ *In re O'Brien v. Condon*, [1905], 1 Ir. R. 51, 56, the Master of the Rolls, Sir Andrew Marshall Porter, said:

"This is a typical illustration of a secret trust. That phrase does not necessarily mean a trust of a clandestine nature, or one that is suppressed from the world. It only means a trust which is not disclosed on the face of the will itself."

That case held that a witness who is a beneficiary under a secret trust may still take under the trust. But see *In re Fleetwood*, 15 Ch. D. 594 (1880) *contra*. The reason why the beneficiary of the secret trust may take is because he does not take under the will, but under the decree of equity.

Maddock,³⁸ where Cozens-Hardy, L. J., stated the contract, estoppel, and trust theories which we have already discussed. In that case the testator's intended gifts to third persons out of a specified part of the residue were expressed in a separate written memorandum which the residuary legatee and devisee had assented to, but the gifts were not mentioned in the will. The residuary personal estate not mentioned in the memorandum proved insufficient to pay the debts, and then the question arose whether the secret trusts must bear any part of the deficiency. It was held that the debts must be paid first out of that part of the residue of the personalty not affected by the trust, and then the deficiency must be borne ratably by the specified unattested-trust part of the residue (treated as a specific bequest of that part) and the real estate. That was to prevent the residuary devisee, who was also constructive trustee, from making his *cestuis que trust* stand the whole deficiency, which Collins, M. R., considered would be "committing a fraud."

Cozens-Hardy, L. J., in delivering his separate concurring opinion, said (pp. 230-232):

"It is necessary to consider upon what principle the undoubted rule of the court, that effect is to be given under certain circumstances to declarations in writing not properly attested, is based. It is clear that no unattested document can be admitted to probate or treated as part of the will. It is established that a devisee or legatee, who is entitled absolutely upon the terms of the will, is in no way affected by the existence of a document showing that he was not intended to enjoy beneficially, if he had no knowledge of the document until after the death of the testator. Such a memorandum may or may not influence him as a man of honor, but no legal effect can be given to it. If, however, the devisee or legatee is informed of the testator's intention, either before the will in his favor is made or at any time afterwards before the testator's death, different considerations arise. It is sometimes said that under such circumstances a trust is created in favor of the beneficiaries under the memorandum. At other times it has been said that the devisee or legatee under the will is bound by contract, express or implied, to give effect to the testator's wishes. Now the so-called trust does not affect the property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or

³⁸ [1902] 2 Ch. 220.

dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir at law or next of kin or residuary devisee or legatee. . . .³⁹

"Another way of arriving at the same conclusion is to say that the devisee or legatee is estopped by his conduct from denying that the memorandum is a part of the will.

"But, whether the true principle be trust, or contract, or estoppel, it seems to me that, as between the devisee or legatee and the persons interested under the memorandum, all the same consequences must follow as would follow if the memorandum had in fact formed part of the will.

"Applying these principles to the present case, Miss Washington, who attested the memorandum, must be taken to be subject to a personal obligation to give effect to it, precisely as if it had been duly executed as a codicil and admitted to probate."

The difficulty in the legacy and devise cases is to find a satisfactory place to draw the line. Take three situations:

(1) A testator tells his intended legatee or devisee what he wants done and gets his promise that it will be done, if the testator either makes him legatee or devisee or leaves unrevoked a will already made which names him as legatee or devisee, and the testator, relying on the promise, leaves the property to him. There, if the legatee or devisee refuses to perform, a trust is enforced in favor of the intended *cestui que trust*.

(2) The same as (1), only the legatee or devisee makes no promise, but testator tells the legatee or devisee his wishes, assumes such a promise from the legatee's or devisee's silence, and acts on it. There, if the legatee or devisee refuses to perform, a trust is enforced in favor of the intended *cestui que trust*.

(3) The testator tells the legatee or devisee he is to hold in trust for a *cestui que trust* to be named by the testator in a letter later. After the testator's death a letter addressed to the legatee or de-

³⁹ *Sed quaere* in the case of renunciation or disclaimer. Is not the legal interest in the legatee or donee from the time of testator's death until the renunciation or disclaimer, and is not the latter in effect, — equity is concerned with substance and not mere form, — a conveyance to a donee? And what of the situation where the legatee or devisee who promised dies in the testator's lifetime, leaving children who take by virtue of the common state statute giving them the interest which their parent would have taken if he had survived the testator, and who learn of their parent's promises only after the testator's death?

visée and naming the *cestui que trust* is found with the will, but the legatee or devisee has not seen the letter nor been told its contents in the testator's lifetime. A trust will not be enforced in favor of the intended *cestui que trust*, nor can the legatee or devisee keep for himself, but he will hold for the heirs, next of kin, or residuary devisees or legatees.

Why find a trust for the intended *cestui que trust* in case (2) and not in case (3)? But for the Statute of Wills there would be no reason. In case (3), however, the legatee or devisee knew nothing of the particular *cestui que trust* until after the testator's death, when to recognize the writing as having the effect of naming them, against the legatee's or devisee's objection, would be to give it the same effect as if it were a codicil, although it is unexecuted as one. The testator's expectations are defeated in case (3) if the legatee or devisee sees fit not to realize them,—indeed the English courts will not let the legatee or devisee realize them if he wants to,⁴⁰ — but the statute permits of no compulsion on the legatee or the devisee in favor of the intended *cestui que trust*, because those expectations were not expressed in proper testamentary form. It is not to carry out the testator's intentions that a constructive trust is enforced, in any case of the bequest or devise on an oral trust, but solely in order to prevent the unjust enrichment of the legatee or devisee; and while it is clear that the legatee or devisee must hold in trust for some one, the court of chancery, in designating the constructive *cestui que trust*, must pay due regard to the general purpose of the statute governing wills. When a constructive trust is enforced it is because, to borrow the language of Lord Romilly, in the deed case of *Davies v. Otty*:⁴¹ "It is not honest [of the grantee or devisee] to keep the land" or other property; but that only points out the trustee and the *res*, while the *cestui que trust* must be selected in a sound way.

The real difficulty in every case is to find out by competent evidence whether the legatee or devisee is unjustly enriched and, if he is, at whose expense. In cases (1) and (2) the legatee or devisee induced the testator's action by his express or tacit promise, and for him in breach of that promise to keep for himself the thing bequeathed or devised would be to profit by a breach of faith at

⁴⁰ *In re Boyes*, L. R. 26 Ch. D. 531 (1884).

⁴¹ 35 Beav. 208 (1865).

the expense of the intended *cestuis que trust*, — those sole beneficiaries of the promise whose previously inchoate rights as beneficiaries become irrevocable when the legacy or devise takes effect by testator's death; but in case (3), while the enrichment is actually at the expense of the intended *cestuis que trust*, the court is unable to learn who those *cestuis que trust* are in any way that it is not inconsistent with the statute as to wills to give effect to, against the legatee's or devisee's objection, and accordingly the court, even as a court of equity, is as unable to name them as *cestuis que trust* against the legatee's or devisee's objection, or to charge the conscience of the legatee or devisee with any duty to them, as if the testator had never named them, though the court is not, on principle, unable to permit the legatee or devisee to undertake the intended duty to them. This last qualification is made with some hesitancy, but seems right on principle. Before the court can charge the legatee or devisee as constructive trustee for anybody it must find that he is unjustly enriching himself at the expense of some one; and if it is the fact that he is not enriching himself, but is carrying out the wishes of the testator, equity ought to let him do so, because in that case there is no occasion for the raising of any constructive trust.⁴² The matter is at least debatable.⁴³ In case (3) the legatee or devisee knew that he was to hold in trust, and therefore cannot conscientiously claim the property for himself, so he must hold in trust for some one.⁴⁴ Where

⁴² The English view is that, in the absence of communication of the testator's wishes made to the devisee in the testator's lifetime, "the Statute [of Wills] prevents the court from looking at the [unattested] paper-writing in which the testator's intentions are expressed." Vice-Chancellor Sir W. Page Wood, in *Wallgrave v. Tebbs*, 2 Kay & J. 313, 327 (1855). But before the equity court can act at all, as the English court does act in favor of the heir or next of kin, it must find a basis for a constructive trust in the devisee's conduct; and if he is actually carrying out the testator's intentions, there is no such basis. The language just quoted is sound only where the devisee refuses to perform and claims the devise for himself, or where the will gives the property "in trust" without stating expressly for whom, and the court takes the position that there is an express and not a constructive trust thereby constituted for the heir or next of kin. For the last point of view, in effect, see *Balfé v. Halpenny*, [1904] 1 Ir. R. 486.

⁴³ The strongest argument for letting a trustee carry out the wishes of the creator of the trust, if the trustee desires to do so, even if they are not communicated to him in the testator's lifetime, and even if the trustee cannot be compelled to carry them out, is found in Ames' *Lectures on Legal History*, pp. 285-297. See same article in 5 HARV. L. REV. 389-402.

⁴⁴ If he is not given the least intimation in testator's lifetime that he is to hold in

he refuses to hold for the ones intended by the testator, or is not allowed to carry out the testator's wishes as embodied in the unattested letter, the courts compel him to hold for the next of kin, residuary legatee, heir or residuary devisee.⁴⁵

It is, of course, clear that in cases (1) and (2), where the memory and conscience of the legatee or devisee can be made to yield not

trust, or if what the testator says to him is too general to count, and the gift to him in the will is not expressly "in trust," he takes of course free from any trust. See *McCormick v. Grogan*, L. R. 4 H. L. 82 (1869). In *In re King's Estate*, L. R. 21 Ir. Ch. 273 (1888), where a testatrix bequeathed £200 to her two sisters, Letitia and Martha "to spend as I shall, by word of mouth, direct during my lifetime," and the testatrix said nothing to Letitia and made to Martha only some general statements about wanting to leave "something" to her nephew "young James," but did leave an unattested letter found after her death saying the nephew was to have £100, Monroe, J., said (p. 279):

"But Mr. Meldon argued that, entirely irrespective of the time at which the wishes of the testatrix were communicated to them, their consciences must be held to be affected, and that they cannot be permitted to take property beneficially which their testatrix intended for others.

"Is this distinction supported by principle or authority? I think the two sisters do not stand in precisely the same position. No communication of any kind appears to have been made to Letitia by her sister Anne during her lifetime. Martha does not appear to have told Letitia that Anne had made any statement on the subject of her affairs. All Letitia knew was that a paper or letter was found with the will, requesting her and her sister to spend certain sums in a particular way. She had given no undertaking so to spend the money. In refusing to spend it in the way directed she was guilty of no fraud; she was under no obligation, legal or equitable. Therefore, as regards any share given to Letitia under the will, she was bound by no trust; she took beneficially and her interest passed to the mortgagee. It only remains to consider whether Martha took her share of the £100 intended for 'young James' with the liability of carrying out the trust imposed, or sought to be imposed, by the verbal communication or the letter. Would she be guilty of a fraud on the testatrix if she sought to hold the money for herself beneficially? It is to be remembered that Martha was not informed that a legacy had been or was to be left to her to be applied in a particular way. Anne merely said that she wished to leave *something* to 'young James,' as if she was about to make her will and give him a legacy directly. According to the terms of the will, the sum of £200 was to be applied as the testatrix should 'by word of mouth direct during her lifetime.' The testatrix never did during her lifetime direct how a sum of £200 should be applied. I cannot see that Martha, who received no directions as to the expenditure of any particular sum, who gave no undertaking as to its application, could now be held guilty of a fraud on her sister if she refused to carry out the directions in the letter only discovered after her death."

⁴⁵ See *In re Boyes*, *supra*, where, as the property was personalty, the trust was decreed for the next of kin. Kay, J., said (p. 537):

"I cannot help regretting that the testator's intention of bounty should fail by reason of an informality of this kind." There the legatee wanted to carry out the unattested intentions, but the court would not let him. As already suggested, the soundness of that refusal may well be doubted.

merely the information that a trust or the equivalent was intended, but also the names of the persons to take and the amounts or interests they were to take, the statute governing wills is not infringed when equity tells the legatee or devisee that he must hold in trust for those intended to take. But why should equity tell him to hold for them rather than for the next of kin or the heir? Using the analogy of the contract cases, it may be said that the legatee, or devisee, who cannot hold for himself, because to do so, in breach of his promise to hold for or convey to the intended beneficiary, would be dishonest, must hold on a constructive trust for the intended beneficiary, who is in the same situation as is the sole beneficiary of a contract in that he alone is substantially damaged by the breach of promise. But when that is said, not all is said that needs to be said. That analogy is of no use in England, for there the sole beneficiary of a contract has, as such, no right to sue either at law or in equity on the contract. And even in this country the late Dean James Barr Ames of the Harvard Law School was unable to find any basis other than tort for giving the intended beneficiary of a devise on oral trust any relief. Except in the case where the legatee or devisee made his promise to the testator with the actual intention of keeping the property in disregard of his promise (in which case Dean Ames considered him to commit a tort which equity should compel him to repair specifically by a conveyance to the intended beneficiary), Dean Ames could see no argument in favor of the intended beneficiary. The case of a devise on an oral trust he considered on all fours with that of a deed on oral trust for third persons. Of the deed and the will cases he said:

"If A. conveys land to B. upon an oral trust for C., and B. refuses to perform the trust, the rights of the parties are easily defined. C. obviously cannot enforce the express trust nor, since he has parted with nothing, can he have relief upon any other ground. But A. . . . may recover his land, for B. may not honestly keep it if he will not fulfill the promise which induced A. to part with it. In Massachusetts A. would probably recover the value of the land instead of the land itself.

"One would expect a devise by A. to B. upon an oral trust for C. to create the same rights upon B.'s refusal to perform the trust as a conveyance by A. to B. upon an oral trust for C., except that, restitution to the testator being impossible, his heir, as representing him, would be

entitled to the reconveyance of the land. But, by a strange inconsistency in the law both in England and in this country, C. is allowed to get the benefit of the trust in spite of the Statute of Frauds. . . . It is quite possible that the courts, in giving C. the benefit of the trust in cases of devises by A. to B. upon an oral trust for C., and in refusing him any relief in cases of similar conveyances *inter vivos*, were influenced by the practical consideration that in the latter case the grantor, recovering his property by the principle of restitution, would still be in a position to accomplish his purpose, whereas in the case of the devise the accomplishment of his purpose would depend wholly upon the will of his heir.”⁴⁶

That explanation is undoubtedly forceful; but was Dean Ames right in believing that the majority decisions in the deed cases were sound and that those in the will cases were unsound? To the writer it seems that the courts have been right in enforcing a constructive trust in favor of C. in the will cases, and that the majority jurisdictions have been wrong in refusing to do so in the deed cases.⁴⁷ Dean Ames said that to enforce a trust in favor of C. in the will cases, where C. commits only a purely passive breach of promise as distinguished from an active tort, would be to violate the Statute of Wills and the Statute of Frauds. But why so? It cannot be because to enforce a constructive trust in C.’s favor would be to give him just what he would get if the express trust were enforced; for in the case of a deed by A. to B. on an oral trust for the grantor, Dean Ames favored a constructive trust for the grantor and said:

“A., it is true, may by means of this constructive trust get the same relief that he would secure by the enforcement of the express trust. But this is a purely accidental coincidence. His bill is not for specific performance of the express trust, but for the restitution of the *status quo*.”⁴⁸

Since in the situation just stated it violates no statute to give A. on constructive trust what he would have had under the express trust, it need violate none in the case of a devise by A. to B. on

⁴⁶ Ames, Lectures on Legal History, pp. 429-431. See same passage in 20 HARV. L. REV. 549, 553-555.

⁴⁷ See 12 Mich. L. Rev. 429-444.

⁴⁸ Ames, Lectures on Legal History, p. 427. See same passage in 20 HARV. L. REV. 549, 551.

an oral trust for C., to give C. on constructive trust what he would have had under the express trust, provided only that a satisfactory reason for enforcing the constructive trust in C.'s favor rather than in that of A.'s heir or residuary devisee is furnished. It is believed that in the will cases such a satisfactory reason is found in the fact that C. is the one, and the only one, substantially injured by the breach of promise. It being plain that the devisee must not be allowed to keep for himself, chancery looks around for an appropriate *cestui que trust*. What more appropriate selection could equity make than the *cestui que trust* who would have been express *cestui que trust* but for the failure of the testator to put his wishes in correct form? The property is devoted to trusts by the testator's and the devisee's joint act, and why not have a trust *cy pres* the testator's intention, just as is done in those cases of charitable trusts where the testator provides that a corporation, to be formed for the specified purposes, shall take? There such a corporation cannot take of right, but if it is formed in a reasonable time, it will be given the property *cy pres* the testator's general intentions.⁴⁹ Why make, as *cestui que trust* of the constructive trust, the heir or the residuary devisee, neither one of whom the testator wanted to have the property? Equity, perhaps, cannot properly enforce, even *cy pres*, the details of the express trust, since that might be too like making the unattested will of the creator of the trust take effect; but, since to prevent fraudulent enrichment it must declare a constructive trust, it can name as the *cestui que trust* of that trust the very person intended to be *cestui que trust* of the express trust, and therefore the one injured by the fraudulent acts of the trustee.⁵⁰ The reason why nearly all of the courts enforce a trust

⁴⁹ Gray's Rule against Perpetuities, 2 ed., § 607. See *Sinnett v. Herbert*, L. R. 7 Ch. App. 232 (1872). Cf. *Wallis v. Solicitor-General for New Zealand*, [1903] A. C. 173.

"When a definite function or duty is to be performed and it cannot be done in exact conformity to the scheme of the donor, it must be performed with as close an approximation to that scheme as reasonably practicable, and thus enforced. It is the doctrine of approximation. It is not confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for; and it is an essential element of equity jurisprudence. The doctrine of *cy pres*, in its last analysis, is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor." — Sanborn, D. J., in *Tincher v. Arnold*, 147 Fed. 665, 675 (1906).

⁵⁰ As was said by the court in *DeLaurencel v. DeBoom*, 48 Cal. 581, 586 (1874),

in favor of C. in the devise cases, and why a majority of them do not do so in the deed cases, in the absence of fraudulent intent at the time of taking or of a special confidential relationship between grantor and grantee, is that in the will cases the death of the testator makes evident to the courts what in the deed cases the presence of the living grantor often conceals; namely, that the party to suffer by the breach of trust is the intended *cestui que trust* and not the one who furnishes the property and that, since the unjust enrichment of the trustee, to prevent which a constructive trust is raised, is at the expense of the intended *cestui que trust*, he should be selected by the court of chancery as the *cy pres* constructive-trust *cestui que trust*.⁵¹ No doubt, in cases where wills are concerned, it is easier to give due weight to the intentions of the supplier of the property than it is in cases where deeds are used to transfer the property; but in both cases chancery is, on principle, bound to select as its constructive-trust *cestui que trust* the very man the creator of the oral trust made the *cestui que trust* of the unenforceable express trust.

Before taking up the authorities a word should be said about the kind of promise that will serve to make retention by the legatee or devisee in breach of promise fraudulent. It need not be a promise expressly to hold in trust; it may be a promise to pay to the intended beneficiary money derived out of the property⁵² or to convey land to him⁵³ or to devise to him.⁵⁴ It must, however, be a promise which was meant to be binding and not merely preca-

where a devisee under a will prevented a revocation of a will by promising to hold in trust for certain named *cestuis que trust*: "It would be a fraud upon the testator and upon *cestuis que trust* to permit the defendant to repudiate the trust on the faith of which the estate was devised to him." It is in the legacy, devise, and intestacy cases that the courts see clearly the fraud on the *cestuis que trust* and act accordingly.

⁵¹ That the enrichment is at the expense of the intended *cestui* is seen most clearly in those cases where the promisor partly performs to the *cestui que trust* but his administrator repudiates all liability (see *Williams v. Fitch*, 18 N. Y. 546 (1859)), or where the promisor himself repudiates after partly performing. See *Harris v. Howell*, Gibb Eq. 11 (1798).

⁵² *Williams v. Vreeland*, 29 N. J. Eq. 417 (1878), 32 N. J. Eq. 135 (1880), 32 N. J. Eq. 734 (1880).

⁵³ *Benbrook v. Yancy*, 96 Miss. 536, 51 So. 461 (1910); *Dowd v. Tucker*, 41 Conn. 197 (1874).

⁵⁴ *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464 (1888); *Laird v. Vila*, 93 Minn. 45, 100 N. W. 656 (1904); *Chapman's Ex'r v. Chapman*, 152 Ky. 344, 153 S. W. 434 (1913).

tory.⁵⁵ Whenever the performance is not illegal and the promisor, who is to his knowledge regarded by the promisee as obligated to perform, fails to notify the promisee before taking title that he will not perform, he cannot keep the property and repudiate his express or implied in fact promise without being made a constructive trustee.

[*To be continued*]

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⁵⁵ *McCormick v. Grogan*, *supra*; *In re Pitt Rivers*, [1902] 1 Ch. 403; *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193; *Allmon v. Pigg*, 82 Ill. 149 (1876); *Orth v. Orth*, 145 Ind. 184, 42 N. E. 277 (1896). Cf. *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240 (1901).

In *McCormick v. Grogan*, *supra*, p. 99, Lord Westbury, in passing on the question whether a devisee and legatee was to be deemed a trustee because of a conversation between himself and the testator about a letter which was later found with the will and which named gifts which the testator would like made, refused to imply a trust because it was impossible to say that what the legatee and devisee said to the testator amounted "to a distinct promise, the breach of which would constitute a fraud; for you cannot constitute a fraud in this matter unless you find that there is a distinct and positive promise, the non-fulfillment of which brands the party with disgrace as having personally imposed on the testator . . . and there is nothing, therefore, to justify the appellant in coming here to fasten that personal imputation upon the respondent and then to derive from that a conclusion of trust in favor of himself."

THE QUESTION OF FEDERAL DISPOSITION OF
STATE WATERS IN THE PRIORITY STATES¹

WHICH has the authority, — the federal government or the state, — to dispose of the waters of the streams in our priority states? In other words, which of the two is to determine what the system of water rights for the state shall be, — for instance, whether riparian or priority, — and to dispose of rights to water thereunder? Here we have the greatest and most interesting of the many unsettled questions in the law of western water rights.

What difference does the decision make? A very decided one. If, for instance, the federal government has the authority, then the State Engineer of Wyoming is wrong in his contention that the Reclamation Service has no right to divert from the North Platte in Wyoming a large quantity of water for the irrigation of land in a neighboring state; and the Department of Justice at Washington is right in the position which it has recently taken in asserting that all stream waters not yet appropriated in the priority states are subject to disposition by the federal government and not by the state.

If the authority in question is lodged in the federal government, then, except to the extent of the government's consent, the state may not ordain or maintain any system of water rights at all or determine by whom rights to water may be acquired or upon what terms or what the nature of the right shall be.

Such consequences, indeed, justify the inquiry, — which, the federal government or the state, is the disposing authority?

My topic and the method of treating it are such that for the sake of clarity, it is best to state at the outset that I take the position that the power of disposing of the waters of the state is lodged not in the federal government but in the state. The theory by which I reach this conclusion is that there is a distinction between

¹ From a recent address before the Colorado State Bar Association at Colorado Springs. The author desires to acknowledge helpful suggestions from Roscoe Pound, Esq., Professor of Law in Harvard Law School.

sovereignty and ownership; that prior to statehood, the United States had sovereignty over but not property in the waters; that by conferment of statehood, this sovereignty was passed to the state which, in consequence thereof, became vested, to the exclusion of the federal government, with power to dispose of the waters and to create either in itself or in others property rights in respect thereto.

SYSTEMS OF WATER RIGHTS

Two distinct systems of water law are known to the people of the United States: first, the riparian; second, the priority or appropriation. A water right, under either system, is not ownership of the water itself as it exists in the natural source of supply but rather of a right to make use of the water. The property is in the *usufruct*, not in the water or *corpus* itself, and under either system, the right is an incorporeal hereditament.² Although the rights under the two systems are alike in these respects, there are others in which there is a radical difference. The fundamental principle of the riparian system is that of equality, — equality among the riparian proprietors, not necessarily to equal amounts of water, but in the right to make what, for them respectively and under all the circumstances, is a reasonable use of the waters. The cardinal principle of the priority system, on the other hand, is discrimination, — discrimination in favor of the oldest user or, as he is called, appropriator. When there are many riparian proprietors along a stream, the riparian system does as well by the most recent arrival as by the first, but the priority system awards prior rights to the different users, to the extent of their respective applications to use, in the order of the age of their respective uses, — to the first user or appropriator of water, the first preference or priority to the water, to the second appropriator, the second priority, and so on. The riparian system restricts the use of the water to riparian lands; the priority or appropriation system does not.

Physically, the riparian system is better adapted to lands situated in moist climates while the priority is the better adapted to areas that are dry and mountainous in that frequently the lands are the

² *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. 561 (1886); *Wyatt v. Larimer, etc. Co.*, 18 Colo. 298, 33 Pac. 144 (1893).

best served by uses of water away from the streams, and that the water being scarce and the expense of transporting heavy, he who undertakes the expense must be assured in advance that those who come after him may not deplete his supply. Better that some users have enough and others none, than that all should go short.

The priority system is exclusively in force in the seven semi-arid states of Colorado, Wyoming, Utah, Nevada, Idaho, New Mexico, and Arizona, and is partially in force in the less arid states of California, Montana, North Dakota, South Dakota, Washington, Kansas, Nebraska, Oklahoma, Oregon, and Texas. The riparian system also is partially in force in these states wherein the priority system is partially in force, and is exclusively in force in all the remaining states of the Union, *i. e.*, in all states wherein the priority system is not in force either exclusively or partially as stated.

Historically, with us, the riparian system is the older of the two and came from England. The priority system, whatever its history may have been elsewhere, is indigenous to our own country and is one of the two bodies of substantive law (the other being mining) given to American law by the West.

The states I have enumerated as states wherein the priority system is in force either partially or entirely, were originally, except as to Texas, portions of a great public domain of the United States acquired for the most part from Mexico, but also in part from France, Great Britain, and from the State of Texas. As for the area which is now the state of Texas, it never was a part of the United States' public domain but having already become free and independent by revolt from Mexico, was admitted directly into the Union. The great public domain thus variously acquired by the United States was, at the time of its acquisition, not private property but almost wholly public domain of the nations ceding it.

THEORIES INVOKED TO LEGALIZE THE PRIORITY SYSTEM

The priority system originated among the "forty-niners" of California in what was then neither territory nor state, but the unorganized public domain of the United States, and at first was devoted to mining uses, but later the system spread and the uses were extended until now, as we have seen, seventeen states enforce the system exclusively or partially and the waters may be used for any

and all beneficial purposes. When the forty-niners originated the system, they were without law save of their own making, but later the system was recognized by judicial decisions and legislative enactments of organized territories, states, and of the United States. The first reported case sustaining the priority doctrine was *Eddy v. Simpson*,³ decided in 1853. The first legislative recognition was by the state of California in 1851 by an act⁴ providing that:

"In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim . . ."

The first legislative recognition by the United States was the Act of July 26th, 1866, throwing open the mineral portion of the public domain to private acquisition and providing also that:

"Whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain the party committing such injury shall be liable to the party injured for such injury or damage."

The first judicial decision of the United States Supreme Court upholding the priority system was that of *Atchison v. Peterson*,⁵ decided in 1874. Since these first favorable recognitions there have been many others, both legislative and judicial, from territorial state and federal governments. Two of the later federal statutes, although there are numerous others, deserve especial notice. One was an act⁶ passed in 1870, providing that:

"All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used with such water rights as may have been acquired or recognized under [the Act of July 26, 1866]."

³ 3 Cal. 249.

⁴ Civil Practice Act, Apr. 29th, 1851, § 621, now found substantially unchanged in Code of Civil Procedure, § 748.

⁵ 20 Wall. (U. S.) 507.

⁶ Revised Statutes, § 2340.

The other was the Desert Act of 1877⁷ providing for the private reclamation of desert lands by conducting water thereto under the priority system, and also providing as to the waters in excess of those so needed that:

"All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The priority system was, to the people creating and extending it, a novelty. A number of theories were advanced, and are still advanced, for the purpose of legalizing it. The principal theories have been those relating to the source of legal authority, — whether from the federal government or from the state, — for manifestly no rules as to water rights, any more than other rules, can be law at all unless emanating from that one of the two possible sources, which, for the purpose of legalization, is the proper sovereign authority. That between these two theories no final choice has been made by the Supreme Court of the United States is largely due to the fact that in the main the federal government and the state, each in its own way, have supported the priority system. With the two sovereignties thus uniting to uphold the system there has not been the occasion to decide which of the two is the one whose consent is necessary and controlling. Even so, it is surprising that a certain relation between water claimants has not presented to the Supreme Court of the United States long ago, and in compelling manner, this question of source of authority. I refer to the relative claims of a prior riparian proprietor claiming solely as such under a United States patent to riparian land and a subsequent appropriator, both being within a state which by its laws purports to do away entirely with the riparian system, — an issue there being whether it is within the power of a state to dispose of the waters under a priority system as against a prior riparian patentee of riparian land on the same stream, claiming by reason of the priority of his grant, that he receives as an incident thereto, although not expressed, the water right which, more generally speaking, grants of riparian land have always carried in the history of English and American law, namely,

⁷ 19 Stats. 377.

a water right under the riparian system. Some day, and soon, however, the issue between prior riparian and subsequent appropriator and the difference between federal and state statutes as to details of the priority system and the rivalry between the forces of federal and state conservation of natural resources must force the decision as to which of the two sovereigns is the authorized disposer of the waters and is, therefore, to be obeyed.

Two theories have been advanced in reference to the source of authority,—one commonly known as the California doctrine, the other as the Colorado doctrine, the former ascribing the authority to the federal government, the latter to the state. More fully the California doctrine may be stated as follows: that when the United States by cession from the ceding nations became the owner of the lands now comprising the priority states it became as well the owner in a strict proprietary sense of the right to use the waters flowing over these lands; that while it was such proprietary owner, statehood or state sovereignty was conferred upon what are now the priority states: that sovereignty is different from ownership, and the conferment of the former upon a state passed only political powers and not property; that in consequence, although the federal government is no longer sovereign in respect to the waters within the priority commonwealths, the United States still has its original property right to use the water just as it continued to own the public lands themselves; that by the federal Constitution,⁸ Congress alone may dispose of federal property and, therefore, of this usufructuary right of the United States and, accordingly, no state has a right by virtue of its statehood or sovereignty to determine what system of water rights shall prevail therein or who may be the owner of such rights or how they may be acquired or for what purpose; that no one has acquired or can acquire any usufructuary right in the waters except by and with the consent of the federal government; that the Act of '66 and the Desert Act of '77 (to both of which I have referred) the principal federal statutes purporting to create priority rights to the use of water in others than the United States, are really grants of property rights in the use of water to unnamed grantees, to take effect upon performance by them of the physical acts (appropriation) required by the laws

⁸ Art. IV., § 3, cl. 2.

of the different priority states; that where there are, in a priority state, rival claimants to water from the same stream, one claiming as a prior appropriator and the other merely as a patentee of the United States to riparian land, both are United States grantees of the right to water, but the prior appropriator prevails to the extent of his appropriation over the subsequent patentee because of being the earlier grantee; that on the other hand where the patent to the riparian land is prior to the appropriation, the grant of the land carries with it a right to a riparian use of the water and, accordingly, to the extent of such riparian use the prior patentee prevails over the subsequent appropriator; that to the extent the United States, at the time of admitting a priority state into the Union, had not granted away its property rights in the use of the waters in the form of grants of riparian lands to patentees or of appropriations by appropriators, or has not done so since, the United States is still the owner thereof, with full power of disposition.

The Colorado doctrine may be put in this way: that while prior to statehood of the priority states the United States had sovereign jurisdiction over the waters, and appropriation rights acquired during that time were derivable exclusively from the United States, yet the riparian system never was in force in the areas afterward comprising the Colorado-doctrine states; that the conferment of state sovereignty vested in the state as an incident of such sovereignty over the waters the exclusive power to dispose of appropriation rights to the use of water not inconsistent with the rights previously disposed of by the federal government and to prescribe the persons who could acquire them and the terms and purposes of the acquisition; that subsequent to statehood an appropriator does not receive his water right as the grant of a pre-existing property right in and from the United States, but the right is conferred upon him by the sovereign power of the state.

Lux v. Haggin,⁹ the leading case on the California doctrine, summarizes the priority phase of that doctrine as follows:

"Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having

⁹ 69 Cal. 255, 338, 10 Pac. 674, 721 (1886).

a better right than a subsequent appropriator on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval."

In *Willey v. Decker*,¹⁰ Mr. Justice Potter, speaking for the court, deals with both doctrines in the following language:

"In that state (Montana) the doctrine more generally known, perhaps, as the 'California doctrine,' prevails. Stated briefly, that doctrine is that while a stream is situated on the public lands of the United States a person may, under the customs and laws of a state, and the legislation of Congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land; such right being good against all other private persons, and by statute good as against the United States and its subsequent grantees; but that, when a grantee of the United States obtains title to a tract of the public land bordering on a stream, the waters of which have not been hitherto appropriated, his patent is not subject to any possible appropriation subsequently made by another party without his consent. . . .

"Upon that theory the right acquired by prior appropriation on the public domain is held to be founded in grant from the United States government, as owner of the land and water, under the acts of Congress of 1866 and 1870.

"In this state, on the other hand, the common-law doctrine concerning the rights of a riparian owner in the water of a natural stream has been held to be unsuited to our conditions; and this court has declared that the rule never obtained in this jurisdiction (*Moyer v. Preston*, 6 Wyo. 308). It was said in the opinion in that case that 'a different principle better adapted to the material condition of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation.'

¹⁰ 11 Wyo. 496, 73 Pac. 210 (1903).

And, further, in explanation of the reasons for the existence of the new doctrine, it was said, 'It is the natural outgrowth of the conditions existing in this region of country.' The climate is dry, the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few; and while the land contiguous to water, and so favorably located as to naturally derive any sort of advantage therefrom, is comparatively small in area, the remainder, which comprises by far the greater proportion of our land otherwise susceptible of cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessities of our conditions in this respect alone, to say nothing of the other beneficial uses, also important, has compelled the recognition rather than the adoption of the law of prior appropriation.

"In view of the contention in Colorado that until 1876 the common-law principles of riparian proprietorship prevailed in that state, and that the doctrine of priority of right to water by priority of appropriation was first recognized and adopted in the constitution, the Supreme Court of that state, by Mr. Justice Helm, concluded a discussion of the matter as follows: 'We conclude, then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.' And it was further said that the latter doctrine has existed from the earliest appropriations of water within the boundaries of the state."

The Colorado doctrine of sovereign creation by the state has been adopted by the seven states wherein the priority system prevails exclusively, and the California doctrine of ownership and grant by the United States has been followed in the remaining priority states.

THEORIES INVOKED TO LEGALIZE THE RIPARIAN SYSTEM

The Colorado-doctrine states disclaim the riparian system altogether and, accordingly, put forward no theory to support it. They assert state sovereignty over the waters and then proceed by virtue thereof to declare them subject to disposition by the state under the priority system.

The California-doctrine states support their riparian system on the same theory they do their priority system,— grant by the federal government of a previously existing property right in the use of the waters vested in the United States. It is in consequence of this identity of theory that given a case in the same stream of a prior patent to riparian land and a subsequent appropriation from the same stream, the appropriator is subject to the riparian and vice versa,— that, in short, those states have a dual or hybrid system.

FEDERAL GOVERNMENT *vs.* THE STATE IN THE SUPREME COURT OF THE UNITED STATES

We have seen that the states are divided on the question of whether it is the federal government or the state that has the power to dispose of the state waters and in doing so to determine the system the state shall have and the acquisition of rights thereunder.

The controversy, involving as it does, a federal question, is one for which the ultimate decision must come from the Supreme Court of the United States. That the federal government has jurisdiction over the streams of a state for two purposes is certain, and that court has so held: first (by the commerce clause of the federal constitution), over navigable streams to the extent of preserving the public right of navigation;¹¹ second (by Article III containing the grant of judicial power), in the case of an interstate stream, to secure to each state for its people the use of an "equitable,"— not necessarily equal,—portion of the water for use therein.¹² But the first does not affect the disposition or determine the disposer of waters to the extent navigation is not impaired, and the second does not affect the disposition or determine the dis-

¹¹ *United States v. Rio Grande Irr. Co.*, 174 U. S. 690 (1899).

¹² *Kansas v. Colorado*, 206 U. S. 46 (1907).

poser of the portion to which under the rule of equitable apportionment any given state is entitled for its people.

On the general question of whether it is the state or federal government which has the power of disposition a few opinions have been rendered, but they are not direct or harmonious enough to be considered as committing the court to a final decision. In *United States v. Rio Grande Irr. Co.* (*supra*), Mr. Justice Brewer in rendering the opinion asserted state sovereignty as against all but the United States, apparently not excluding even patentees of the United States, saying:

"It is also true that as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. . . . Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each state yet two limitations must be recognized:

"1. That in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States as the owner of lands bordering on streams to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of government property.

"2. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

". . . So far as those rules [reference here is to the rules of the priority system] have only a local significance and effect on questions between citizens of the state, nothing is presented which calls for any consideration by the federal courts."

Later in *Kansas v. Colorado*¹³ the opinion of the court, written by the same Justice, still asserting state sovereignty, and this time not discussing limitations, contained the following:

"But it is useless to pursue the inquiry further in this direction. It is enough for the purpose of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters . . . it may determine for itself whether the common-law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West, of the appropriation of waters for the purpose of irrigation, shall control. Congress cannot enforce either rule upon any state."

¹³ *Supra*.

In *Winters v. United States*,¹⁴ which involved the question of whether a treaty with the Indians, setting aside for them certain lands as a reservation in the state of Montana, but saying nothing as to the waters flowing through the land, nevertheless created a right to the use of water by implication, Mr. Justice McKenna, writing the opinion in favor of the Indians, and apparently strong in his belief that the disposition of the waters is in the federal government, said:

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be."

In *Boquillas Land & Cattle Company v. Curtis*,¹⁵ wherein the controversy was as to whether a riparian United States patentee claiming under an United States patent confirming a Mexican grant, had a riparian right in the water, the court by Mr. Justice Holmes deciding against riparian rights and recognizing the right even of a territory to reject the riparian system, said:

"It is not denied that what is called the common-law doctrine of riparian rights does not obtain in Arizona at the present date. Revised Statutes of Arizona, 1887, sec. 3198. But the plaintiff contends that it had acquired such rights before that statutory declaration, and that it cannot be deprived of them now; . . . They [the provisions relating to priority] simply follow what has been understood to be the law for many years. *Clough v. Wing*, 2 Ariz. 371. The right to use water is not confined to riparian proprietors . . . such a limitation would substitute accident for the rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land."

In *Los Angeles F. & M. Co. v. City of Los Angeles*,¹⁶ the court, by Mr. Justice Day, declared that it was for the state of California to say whether a Mexican grant made prior to the cession to the United States carried a riparian right, the grant itself being silent as to waters. The state court had held against the existence of the rights. I quote from the opinion:

"In its opinion on the case at bar the Supreme Court of California said that in this respect it was following *Hardin v. Jordan*, 140 U. S. 371,

¹⁴ 207 U. S. 564 (1908).

¹⁵ 213 U. S. 339 (1909).

¹⁶ 217 U. S. 217 (1910).

and this court has frequently held that the extent of the right and title of a riparian owner under a patent is one of local law. See recent decision of *Whitaker v. McBride*, 197 U. S. 510, a case therein cited."

It also is interesting to note that the United States Circuit Court of Appeals, Eighth Circuit, in *Snyder v. Gold Dredging Co.*¹⁷ in holding that as between a prior riparian patentee and a subsequent appropriator in Colorado the patentee had no riparian rights, said:

"That by the settled rule of decision in the Supreme Court of the United States, conveyances by the United States of public lands on non-navigable streams and lakes, when it is not provided otherwise, are to be construed to have effect according to the law of the state in which the lands are situated in so far as the rights and incidents of riparian proprietorship are concerned. . . . Here it is not provided otherwise either by statute or by patent, and as has been seen the local law does not recognize a conveyance of the land as carrying any right to the unappropriated waters of the stream."

From the foregoing opinions it appears that the Supreme Court has leaned, or allowed itself to be quoted as leaning, at one time toward the idea of state disposition of waters, then toward federal disposition, then back again, and that the opinion of Mr. Justice Brewer in *United States v. Rio Grande Irr. Co.* is scarcely consistent with itself, for if the state as against the United States itself cannot reject the riparian rule yet may do it as against the grantees of the United States, it would seem either that the United States itself had no property right at all in the right to use the waters and, therefore, could not complain of the rejection by the state, as against the United States, or else that having such property right Congress ought to be permitted to dispose of it to grantees under Art. IV, § 3, cl. 2, conferring on that body "the power to dispose of . . . the territory or other property of the United States."

DISTINCTION BETWEEN SOVEREIGN JURISDICTION AND OWNERSHIP

The question being an open one in the Supreme Court let us, with deference, assume to consider what the decision ought to be.

In the ensuing discussion, the phrase "political state," tautological though it may be, will be used as the equivalent of the term

¹⁷ 181 Fed. 62 (1910).

"state" in political science, "a particular portion of mankind viewed as an organized unit,"¹⁸ and in contradistinction from a member state of the Union. For such a member the word state or commonwealth is reserved. Viewed from the standpoint of political science the federal government and the commonwealth are but agencies of that one of the world's political states called the United States of America.

With confusion of terms out of the way the first thing for us to do is to acknowledge the distinction¹⁹ between sovereignty and ownership, between *imperium* and *dominium*. For it may be said that if prior to the statehood of the priority states the relation of the United States to the running streams was one of ownership or property either in the waters themselves or in their use, then the United States is the owner still, for it is not permissible to argue that there is anything in the conferment of statehood, which any more requires a transfer to the state of property in respect to waters, than in respect to lands or anything else. All that is necessary is a transfer not of property but of sovereign jurisdiction. Of whatever, on conferment of statehood, the United States remained the owner, of that, Congress, under the constitutional provision already alluded to, retained full power of disposition. But if the relation of the United States to the waters was one of sovereign jurisdiction and not of ownership, then, it may be that the power of disposition passed, upon conferment of statehood, to the states and now belongs to them.

There are some who, assuming that the United States had a property in the waters or in the use of them, contend that the property right passed to such of the priority states as had state constitutional provisions asserting state or public ownership of the waters. If this be the only theory of supporting a power in the state to dispose of the waters, only some of the states would have the power, for only some have constitutional provisions of this character. Furthermore, since the primary purpose of the process of admitting a state into the Union is to admit it into the Union rather than to make contracts transferring property of the United States to the state, there are good reasons to doubt, especially as to certain

¹⁸ Burgess on Political Science & Constitutional Law, p. 53.

¹⁹ *Mobile v. Eslava*, 16 Pet. (U. S.) 234 (1842); *Wiley v. Decker*, *supra* n. 10.

states, whether such provisions should have the contractual effect thus ascribed to them.

Let us recur to the distinction between sovereignty and ownership. For a political state to exercise sovereignty throughout its geographical sphere is one thing; to own in a strict proprietary sense what is within that sphere is another. Most political states do not own the greater number of things within their borders, but permit them to be owned privately, exercising, however, sovereign jurisdiction over them. Many things, of course, political states actually own; for example, governmental buildings, museums, libraries, and frequently, public service instrumentalities. In these instances the political states sustain the dual relation of sovereign and owner. More things, indeed everything, could be owned by the political state if the latter wanted to become the owner. All that would be necessary would be the exercise of the sovereign jurisdiction in that behalf. Such a complete exercise, however, would be unwise and is unlikely.

As to lands of the United States situated within a state the relation of the United States thereto is one of ownership, not of sovereignty, while that of the state is one of sovereignty, not ownership, except that where the lands are bought by the consent of the state legislature for "forts, magazines, arsenals, dockyards, and other needful buildings" the sovereign and proprietary powers are, under the federal constitution²⁰ united in the United States. Said the United States Supreme Court in *Pollard v. Hagan*²¹ in a case involving the relation of the United States to certain of its lands within a state:

"The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted."

The same court in *Kansas v. Colorado*²² declared:

"These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitu-

²⁰ U. S. Const., Art. I, § 8, cl. 16.

²² *Supra*.

²¹ 3 How. (U. S.) 212 (1845).

tion, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer states, yet the powers of the National Government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

The distinction between sovereign jurisdiction and ownership is not one of quantity, — as between the whole and the part, — but of cause and effect. It is one of the functions of sovereign jurisdiction to create ownership, — in other words, to determine what things are not subject to ownership and what things are, and as to the latter, who shall own them and how the ownership may come about, and what shall be the estates in the thing owned. The ownership created may be either private or in the political state itself, but whether in the one or in the other, or not created at all, the political state still possesses what is greater, although different, — the supreme power of sovereign jurisdiction over persons and things within its geographical sphere, and through its exercise, now in this direction, now in that, may accomplish this or that result of legal significance, whether it be ownership, rule of contract, definition of crime, or what not. It is to be noted, however, that because sovereign jurisdiction has the power to accomplish this or that result we are not to infer necessarily that it has done so. A result cannot exist before it is caused. There are many things which sovereign jurisdiction can do, but which it has not done. Declaring all crimes capital is one of them. Making statutes of limitations different from what they are is another. Possibly to come directly to our question and to take the United States as an example, the creation of ownership or property in the United States either in running waters, or in the use of the running waters, on the public domain, later and now included within the priority states, is yet another.

THE FEDERAL GOVERNMENT EXERCISED SOVEREIGN JURISDICTION
BUT WAS NOT THE OWNER

Is, then, the right to choose systems and dispose of waters thereunder a function of the state? Did the United States really own in a proprietary sense the waters or rights of use in the priority states previous to statehood?

The answer to these questions involves an inquiry into the nature of property in running waters or in the right to use them, and also into the relation of the political state thereto.

Running water itself is not subject to ownership at all. Water running stays with no one but travels far. It crosses lands of different owners, flows past many cities. Sometimes its track is the boundary line between nations. At other times the flow is from one nation into another. This travelling character of running water has fixed its legal status as a thing not subject to ownership, but rather to be classed with other natural media which, although not subject to ownership by any one, are open to the common enjoyment, such as air, light, and wild game. This is true by Roman law,²³ civil law,²⁴ common law,²⁵ and by the priority law of the western states.²⁶ When property exists in respect to running waters the property consists not in the water itself in the natural state, but in the right of use. It is the *usufruct*, not the *corpus*, that is owned.

If in making the use, a portion of the running water is completely severed from the natural source and reduced to possession, property may exist in the severed portion itself,²⁷ but in respect to the water while running in the stream the property, when property exists, is in the right to make a use and not in the *corpus*.

The relation of the political state to running water is not one of ownership, for the trait of running as much unfits the water for ownership by the state as by individuals. As well might one say that the political state owns several of the other natural media. The startled hare, the wild duck, the air particles that cross every

²³ Institutes of Justinian, lib. 2, tit. 1, § 1.

²⁴ Pothier, *Traité du Droit de Propriété*. No. 21; Aubrey & Rau, *Droit Civile Français*, 4 ed., vol. II, p. 34; Eschriche, *Aguas*.

²⁵ Bracton, lib. 2, f. 7, § 5. *Embrey v. Owen*, 6 Ex. 353 (1851).

²⁶ *Wyatt v. Larimer, etc. Co.*, *supra*.

²⁷ *Embrey v. Owen, supra*; *City v. Stacey*, 169 N. Y. 231, 62 N. E. 354 (1901).

day the boundary line between the United States and Canada, — whose are they while in their condition of nature? No one's. They belong neither to man nor nation unless or until reduced from that natural condition to one of human possession. The law as to these things might be different. It is conceivable that the political state might say that property should exist in these media while in their natural condition; that the hare, for instance, would be the property of A. while on A.'s land, of B. while on B.'s land, or of the political state while within the boundaries thereof, and of the neighboring political state while within the boundaries of the latter. It would be property, however, which would change its owner a dozen times a day, depending upon its physical position, — a peculiarity so violative of all our ordinary ideas of property that we are quite satisfied to leave these things as they are now, exempt, while in their natural condition, from being subject to ownership at all. The true relation of the political state to these natural media is one of sovereign jurisdiction and control rather than of ownership, — *imperium* rather than *dominium*. In the exercise of that jurisdiction and control the political state, without actually owning these things itself or permitting others to own them, provides for their protection when necessary, regulates their use, and prescribes upon what terms title to rights of use may be obtained and by whom. Not only does the political state not own in any proprietary sense the *corpus* of the running water, but it does not necessarily or ordinarily own in any such sense even a right to use the *corpus*. True, it has sovereign jurisdiction over the *corpus*. Therefore, it may if it pleases exercise that jurisdiction in such wise as to create definite property rights in the *corpus* or in the use of the *corpus*, either in favor of itself or in favor of others, but until exercised the property right either in the *corpus* or in the use of it has not been created. If there be in the political state ownership of the waters or of the right to use them it is mere "political ownership" for the common enjoyment, not for the political state in its private or proprietary capacity.

Some of the Colorado-doctrine commonwealths, bent on putting the waters as far as possible beyond the control of the federal government, have adopted constitutional provisions declaring the waters to be the "property of the public"²⁸ or the "property of

²⁸ Colorado Const., Art. 16, § 5.

the state.”²⁹ Even these provisions which are substantially the same in effect³⁰ are not considered as vesting the state with any property right in the waters or in their use but as affirming sovereign jurisdiction over them. As was said by Mr. Justice Potter in *Farm Investment Company v. Carpenter*:³¹

“There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration, that the water is the property of the public, and that it is the property of the state.

“It is said in *McCready v. Virginia*, 94 U. S. 391, in discussing the subject of tide waters: ‘In like manner the states own the tide waters themselves. . . . For this purpose, the state represents its people, and the ownership is that of the people in their united sovereignty.’ See also *Martin v. Waddell*, 16 Pet. 410; Gould on Waters, sec. 32; Kinney on Irrigation, secs. 51, 53; *Bell v. Gough*, 23 N. J. L. 624. ‘The Sovereign is trustee for the public.’ 3 Kent’s Com., 427; *Miller v. Mendenhall* (Minn.), 8 L. R. A. 89.

“The ownership of the state is for the benefit of the public or the people. By either phrase, ‘property of the public’ or ‘property of the state,’ the state, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity.”

The same Justice said also in *Willey v. Decker*:³²

“The obvious meaning and effect of the expression that the water is the property of the public is that it is the property of the people as a whole. Whatever title, therefore, is held in and to such water resides in the sovereign as representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor.”

Now when the United States acquired from the ceding nations the arid western lands which later comprised the priority states, the United States became possessed of sovereign jurisdiction and control over the waters flowing upon and through them. Out of that sovereignty the United States could have created ownership consisting of a right to use the waters or, for that matter, consisting of the very waters themselves had it wanted to do so, but we do not ascribe any such exercise of sovereign power merely from the acquisition of it, where nothing indicates the exercise and

²⁹ Wyoming Const., Art. VIII, § 1.

³⁰ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 138, 139, 61 Pac. 258, 265 (1900).

³¹ *Supra*.

³² *Supra*.

where the practice of political states is against it. The United States then never became the owner in any proprietary sense of either the *corpus* of the running water or of a right to use it.

But, says some one, — did not the United States prior to the statehood of the different priority states, grant water rights under the Act of '66 and other federal statutes, and could this have been done unless the United States already owned as property the rights granted? By way of answering it may be said that in order for the United States to vest in another a property right in water or in the use of water it was not necessary that the property right should have been owned by the United States. Property rights are the product of sovereign jurisdiction. Without its exercise, express or implied, they cannot exist even in the political state itself. Why, then, must the political state in order to vest a property right in another first create the right in itself and then transfer it instead of taking the short cut of creating the right in the other in the first instance? Private owners, indeed, may not grant property rights unless owning them, but political states are not necessarily so limited. They may grant or create, — the word matters little if we understand the sense, — property rights directly out of their sovereign power. The man who produces liquefied air becomes the owner of it, but surely no one would contend that the political state actually owned the air before it was liquefied. Nor does the political state own the wild game before reduction to the possession of the hunter. The opinion of the court by Mr. Justice White in *Geer v. Connecticut*³³ declares and cites state supreme court authorities in support, that in the United States wild game, although subject to the sovereign jurisdiction of the state is not owned by the state in any proprietary sense. The following passage is taken from the opinion:

“Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals

³³ 161 U. S. 519 (1896); accord, *Ex parte Bailey*, 155 Cal. 472, 474, 101 Pac. 441 (1909).

as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, is thus stated in a well-considered opinion of the Supreme Court of California.

"The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.' *Ex parte Maier* (103 Cal. 476).

"This same view has been expressed by the Supreme Court of Minnesota, as follows:

"We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common.' *State v. Rodman* (58 Minn. 393)."

But, says another, — when the United States originally acquired the lands did not the common law affix a riparian right thereto? The common law is a persistent thing. It has circled the globe. But it is not a straight-jacket into which may be thrust, willy-nilly, sovereignty itself. The common-law rule of riparian rights did not attach unless it was the law of the United States that it should attach. The United States never declared itself in favor of any such law expressly. The rights that it thus far has expressly defined by its statutes, as by the Act of '66 and the Desert Act of '77, have been, although in favor of other persons than the United States itself, rights of the contrary variety, — by appropriation. Nor should the law of riparian rights be presumed to have attached by implication grounded on any theory of its supposed desirability. Indeed, the implication would be the other way. The domain acquired by the United States was a vast one to which the common-law rule confining the use of waters to riparian lands was not adapted, and the expectation was that ultimately the domain would be organized into states and the latter admitted to the Union. Under such circumstances how much better from an economic and a political point of view to regard the United States as owning no riparian rights in the waters but rather as possessing that larger power of sovereign

jurisdiction out of which could be created later on whatever water system and rights thereunder might prove the most desirable and to the states thereafter to be created the most acceptable! These considerations are sufficient to negative the idea that the common-law riparian rule became the law of the United States by any implication based on desirability. Indeed, it is a rule of the common law itself to abolish a given one of its other rules when the reason for it ceases. Or, to put the idea in a different tongue, — “*Cessante ratione lege, cessat et ipsa lex.*”

But did not the treaties of cession, whereunder the public domain was acquired, vest in the United States a riparian property right? They do not say so,³⁴ and since the public domain acquired by the United States was public domain of the ceding nations the same considerations which render the riparian rule undesirable to the United States must have made it equally so to them. Furthermore, the larger part of the lands of the arid West were acquired from old Mexico, and as to a considerable portion of such part, namely the portion once falling within the Mexican state of Sonora, the riparian rule did not exist, but, instead, the rule of appropriation.³⁵

THE STATES SUCCEEDED TO THE SOVEREIGN JURISDICTION OF THE
UNITED STATES, AND THEREFORE TO THE DISPOSITION
OF THE WATERS

When under our federal political system of divided sovereignty the priority states, California, Colorado, and the rest, were admitted one by one into the Union, they succeeded to the general sovereign jurisdiction formerly possessed by the United States over such of the running waters of the public domain of the United States as were within their respective boundaries.³⁶ Although speaking not of water but of another of the natural media, Mr. Justice White said, in *Geer v. Connecticut*³⁷ already once quoted:

³⁴ Guadalupe Hidalgo, 9 Stat. L. 928; Louisiana Purchase, 7 Fed. St. Ann. 542; Boundary Treaty, 7 Fed. St. Ann. 587; Gadsen Purchase, 7 Fed. Stat. Ann. 704.

³⁵ Boquillas Land & Cattle Co. v. Curtis, *supra* n. 15.

³⁶ *Geer v. Connecticut*, 161 U. S. 519, 527, 528; *Pollard v. Hagan*, *supra* n. 21.

³⁷ *Kansas v. Colorado*, *supra*.

"Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power that the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution."

The succession of the state in respect to the running water was to power, not to property, for of the latter the United States had none.

Out of the power thus acquired the states could, as could and did the United States before them, create property rights in the use of the waters, — could determine the water system and dispose of water rights thereunder. The exercise of this power would be subject only to such appropriation rights as the United States prior to the statehood of any given state had already created, upon appropriations being made under federal statutes, notably those of '66 and of '77, above referred to, when agreeable to "local customs, laws and decisions."³⁸ The old appropriation rights did not harass or annoy the states in the exercise of the new power, for the creation of the rights had been by the federal statutes themselves conditioned, as we have seen, upon agreeableness to "local customs, laws and decisions of court" and the conferment of state sovereignty did not change the local popular will or policy favoring the priority system.

ANALYSIS OF FURTHER AUTHORITIES

We ought to analyze further some of the federal statutes already referred to, and also a number not even mentioned, to ascertain how well they square with the main propositions advanced in this discussion, but the analysis would require more time than the occasion permits. I can only say that the statutes in the main appear to be consistent with what has been advocated here, and that where they are not, they amount at most to implied declarations that there exists in Congress a power of determining who may acquire property rights in the waters or in their use, and the terms of the acquisition. Such declarations are without effect on the states, for the power referred to passed along with other powers of

³⁸ A. C., July 26th, '66.

general sovereign jurisdiction to the states, upon the conferment of statehood. When once a state has come into being any and all subsequent declarations by Congress, either of ownership or of powers of disposition, come too late. The sceptre has passed.

CONCLUSION

If what has been advocated here is true we now have reached the following conclusions: first, that the United States acquired from the ceding nations sovereign jurisdiction over the running waters but not property in them or in their use; second, that prior to conferment of statehood upon the priority states the United States never exercised this jurisdiction to create in itself a general proprietary right either riparian or by appropriation or otherwise, but only to create appropriation rights in others where agreeable to "local customs, laws and decisions;" third, that when the priority states were admitted to the Union they succeeded the United States in the general sovereign jurisdiction over the waters, with no property interest therein or in the use thereof outstanding in favor of the United States; fourth, that this sovereign jurisdiction acquired by the priority state is subject to three restrictions, sovereign not proprietary in character, one of them being that the United States may not in the case of an interstate stream deprive the other state or states of its or their "equitable" portion of the water of the stream, another being that navigability of navigable streams must not be impaired, and the last being subjection to priority rights created by the United States in appropriators prior to statehood; fifth, that under and by virtue of the sovereign jurisdiction thus acquired and to the limitations mentioned, the state became the lawful disposer of the waters; with power to select any water system desired, whether priority, riparian, or, probably, as in the California-doctrine states (and notwithstanding the unsound legal reasoning of that doctrine, to say nothing of its economic inconsistency) the priority and riparian combined, to determine the persons who could acquire rights under the system chosen, the purposes for which the acquisition could be made and the incidents thereof; and with power in the Colorado-doctrine states to dispose, to the exclusion of the federal government, of all the waters not then or yet appropriated.

L. Ward Bannister.

ANOTHER WORD ABOUT THE EVOLUTION OF THE
FEDERAL REGULATION OF INTRASTATE RATES
AND THE SHREVEPORT RATE CASES

MR. COLEMAN'S studious and painstaking article¹ in the November, 1914, number of the REVIEW on the "Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases," and his criticism of the Supreme Court's decision in that case² and in the Minnesota Rate Cases,³ naturally impel us to a reconsideration of the theory upon which our system of precedent is based. His criticism of the court's decisions in these two cases is based, not upon any inherent unsoundness or want of expediency, as I understand it, but, rather, upon the alleged departure from the rules the court had laid down in prior cases on this subject; and Mr. Coleman complains of the judicial legislation or "judicial amendment" of the Constitution which such departure involves. He finds this departure by assuming that the definition of the "regulation" of interstate and intrastate commerce, and of such "commerce" itself, was and is the same thing, inherently and in legal contemplation, at all times,—when *Gibbons v. Ogden*⁴ was decided and at the date of these last pronouncements of the court on the subject. It is this rigidity of definition and lack of adaptability to changing or changed conditions which have brought so much criticism on the legal profession, from even the most intelligent layman; and the question to which I want to direct attention is whether such criticism is not sound and whether the Supreme Court is not demonstrating the greatest wisdom in adopting changed definitions not only in respect of the "commerce" clause, but also as to many other legal subjects which changed economic and social conditions seem to require.

Mr. Coleman's criticism of the two decisions under consideration comes, in the last analysis, to this: The court has held consistently that purely intrastate or local matters are under the state's control, as distinguished from that of the federal government; intrastate

¹ 28 HARV. L. REV. 34.

³ 230 U. S. 352 (1913).

² 234 U. S. 432 (1914).

⁴ 9 Wheat. (U. S.) 1 (1824).

commerce is, *physically* and *abstractly*, severable from interstate commerce and has been held to be so by the Supreme Court; therefore the federal government should not now be held to have the power to regulate or control intrastate commerce in any way by virtue of the power to regulate commerce betwixt the states. It is immediately discernible where the difficulty lies in this proposition: it lies in the fact that the minor proposition is irrelevant. The question that presses is, not whether interstate and intrastate commerce are capable of *abstract* or *physical* separation or have been held to be so at some past time, but, rather, whether, with the development of modern economic complexity and interdependence, the two have not actually come to such interrelation that the power to regulate the one necessarily involves and implies, if not an absolute power to regulate the other, yet an incidental power to affect it seriously. If this question is answered in the affirmative, the decisions of the Supreme Court will be found entirely consistent. From the time of the earliest decisions the court has held that the federal government has the power to regulate interstate commerce, even though such regulation involved an incidental control of or effect upon some matter of purely local concern. Initially there was no such intimate relation betwixt interstate and intrastate commerce as made them inseparable in certain aspects. Accordingly it was held that Congress could not regulate or affect intrastate commerce under the guise of regulating interstate commerce. But in time the *fact* changed: state and interstate commerce became wellnigh inextricably intertwined, and with the change of *fact* the decision of the court changed, as it necessarily had to do to preserve the *principles* underlying the whole chain of decisions, *i. e.*, the supremacy of the federal control of interstate commerce. In a word, then, my text is the desirability of adherence to the big principle underlying precedent decisions, rather than to the letter of such decisions. Changes of economic or social conditions often make this slavish adherence to the letter of the prior decision the widest departure from the principle which underlay the earlier cases. Perhaps the greatest glory of our common-law system of precedent has been that the stress laid on principles, rather than on the letter, of the earlier decisions has tended to give us a set of flexible rules which can be made to fit our advancing civilization without the disturbance incident to the formal abro-

gation of the old laws and the adoption of new ones, such as we find in the case of written statutes.

The objection may be urged, that in the subject under discussion we are dealing with a written constitution and that, consequently, there is no proper place for the application of the flexibility we admire in the common law and which, I believe, the Supreme Court is rightly applying in these commerce-clause decisions. Indeed Mr. Coleman specifically urges this when he complains of "judicial amendment." But, I submit, there is quite as much place for this laudable adaptability in the case of the definition and application of a big, sweeping phrase, like this "regulation of commerce among the states" in our fundamental law, as in the general adjustment and settlement of private rights by the courts where there is no written rule or statute. In each case the *desideratum* is a consistent continuity of principle. To be sure, in each of the two classes of cases the reasons for desiring this consistency or continuity may be different, and, I have no doubt, are so; but this divergence does not change the community of aim. In the ordinary common-law cases, the object is to get a workable rule which people can reasonably know in advance and to which they can make their conduct conform, without hindrance to the normal development of a growing and advancing civilization. In the case of the construction of the constitutional provision, the object the court must hold before its eyes continually is the fulfillment of the idea of the Constitution makers, even though the literal application has been rendered impossible by changing or altered conditions. And, it seems to me clear, it is the duty of the court to see to it that this big purpose is carried out, rather than to aid in the defeat of such purpose by the application of some prior decision really based on different facts.

There can be no doubt that our Constitution makers,—or some of them at least,—foresaw the tremendous and far-reaching import of this commerce clause, even though they could not anticipate all the details of the development of interstate commerce. That great statesman, Alexander Hamilton, in drafting the address to the states of the Annapolis convention in 1786, says:⁵

"They [the Commissioners] have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter

⁵ Alexander Hamilton's Works (Senator H. C. Lodge's 2d Fed. ed., 1904), p. 337.

so far into the general system of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system."

In other words, even at that early date and before the Constitution had been even framed or formulated, Hamilton and his fellow-commissioners understood that the scope and extent of the power to regulate interstate commerce was very broad. It seems also a fair inference that Hamilton and his co-commissioners had some glimmering at least of the possibilities of development of interstate commerce. I do not mean that they could foresee the time when the artificial barrier of the state lines should practically cease for the purposes of trade, but it is clear that they had in mind the tremendous development of interstate commerce; and there can be no doubt that they intended to vest in the federal government the most absolute control of interstate commerce, no matter how broad and extensive such development might prove to be.

Now, consider for a moment the change of fact with reference to this commerce to which I have alluded. At the time of the adoption of the Constitution the bulk of the trade which existed in the United States was unquestionably intrastate. There had been no general development of the means of transportation whereby a general and complete interstate commerce was possible. Transportation could be conducted only by means of stage coaches and boats, and these means of transit were so slow and inadequate that any general commerce betwixt the residents of one state and those of another was very limited. In this condition of affairs it was no difficult matter for the federal government to regulate interstate commerce without touching the entirely distinct and disassociated trade existing within the different states, and, conversely, the states could regulate intrastate commerce without affecting interstate commerce to any appreciable extent. With the introduction of railroads, however, the situation changed. It became as easy for a man in the distant West to buy his merchandise in New York or Boston as it had been in the early days for the merchant in the interior of the state of New York or of Massachusetts. And with the development of the railroads the time has come when their entire system of transportation, both of freight and passengers,

largely consists of interstate commerce and is laid out and planned on that basis. With such a preponderance of interstate business it is self-evident that any extensive effort on the part of the different states which the railroad traverses, to lay down rules and regulations, though in terms purporting to regulate only the intrastate business, necessarily and vitally affects the larger interstate business which the road is doing. With this fact, and the further indubitable fact that the Constitution makers intended Congress and the federal government to have absolute and entire control of interstate commerce, it seems clear that the power of the federal government under the commerce clause must go so far as to give the federal government power, if necessary and advisable, to prohibit such conflicting regulation on the part of the states.

The decisions of the Supreme Court in the Shreveport Rate Case and the Minnesota Rate Cases, thus, involve nothing more than a recognition by the court of the changed conditions and facts in respect of the character of the commerce of the country and the consequent necessity for a change in ruling as to the scope of the power to regulate commerce between the states. In other words, these decisions represent a real adherence to the principle of the supremacy of the power of the federal government over interstate commerce, which principle, I believe, has been laid down practically from the outset.

I think an examination of the decisions of the Supreme Court involving construction of the other various sections and clauses of the Constitution in respect of the police power, due process, taxation, and the like, discloses the same sound tendency to go behind the letter to the spirit and to make the line of precedent one of principle rather than of details. This tendency, I am sure, we must all approve, and laud in this "hour of trial" of our profession and system.

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DECLARATIONS CONCERNING MENTAL STATE. — In the present state of change in the law one may expect to find the rules of evidence being unwittingly bevelled off and whittled away wherever they appear to impede unnecessarily the path to truth. But even so, the decision of the English House of Lords in *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.*, [1914] A. C. 733, is somewhat disquieting in the results to which it seems to lead. In that case one alleged to be an illegitimate posthumous child of a deceased workman was suing for compensation for the death of his father as a dependent under the English Workmen's Compensation Act.¹ Declarations of the deceased to the mother and to others, admitting that he was the father of the child, and declaring his intention to marry the mother, were held admissible to prove paternity and dependency.²

¹ 6 Edw. VII., c. 58.

² The county court judge had ruled that the declarations were admissible as admissions against the pecuniary interest of the deceased. The Court of Appeal reversed him on this point. *Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130. The House of Lords, without disapproving the reasoning of the Court of Appeal, held that the declarations were admissible on the grounds discussed *infra*. It is interesting to note the strictness of the House of Lords in treating the exception as to admissions against interest, while at the same time apparently throwing wide the gates under the other exception. In view of the father's statutory duty to support his illegitimate child, his pecuniary interest would seem to be sufficiently close to warrant the admission of the declarations on that ground. *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18, 91 N. W. 28. Certainly the arbitrary limitations placed upon this exception by the Court of Appeal seem undesirable.

Under the English Workmen's Compensation Act dependency is a question of fact, turning upon the question, whether there was "a reasonable anticipation that the applicant would be maintained by his father."³ Upon this issue the deceased's intention to marry the girl and provide a home for her and the child was clearly relevant, and under the rule of *Mutual Life Ins. Co. v. Hillmon*⁴ contemporaneous declarations by the deceased were admissible to prove that intention. In admitting the declarations on this issue, therefore, the House of Lords were, in effect, only applying an exception to the hearsay rule already well recognized, although not universally accepted, in this country.

But of the four lords who read opinions in the House, Lord Moulton alone seemed disposed to confine the admission of the declarations to the issue of dependency.⁵ The three others go the full length of admitting the evidence on both issues. Their reasoning on the issue of paternity, as on the other issue, appears to be, that the mental attitude of the deceased toward the mother and her unborn child was relevant upon the issue of whether he was the father of the child, and that mental attitude could be shown by contemporaneous declarations.⁶ If their lordships mean by this that declarations are admissible to prove a contemporaneous state of mind merely because that state of mind logically tends to prove a material existing fact, are they not making the exception to the hearsay rule as broad as the rule itself? If A.'s promise to marry B., or his statements to others indicating his belief that he is the father of B.'s child (and the opinions in the principal case make no distinction), are admissible to prove that belief, and that belief is admissible to prove paternity, why is not A.'s direct statement, "I am the father of B.'s child," admissible for the same purpose? And if that is so, what declarations are not admissible?⁷ If, on the other hand, they mean, as may be inferred from Lord Atkinson's opinion,⁸ that any

³ *New Moncton Collieries, Ltd. v. Keeling*, [1911] A. C. 648; *Schofield v. Orrell Colliery Co., Ltd.*, [1909] 1 K. B. 178, affirmed [1909] A. C. 433. The court so treated it in the principal case. [1914] A. C. 733, 751, [1913] 2 K. B. 130, 143. The act expressly includes illegitimate children under possible dependents. Sec. 13.

⁴ 145 U. S. 285. "Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations." Gray, J., p. 295. Accord, *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961; and cases collected in 3 WIGMORE, EVIDENCE, § 1725, n. 1; SUPPLEMENT, § 1725, n. 1. *Contra*, *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269. But see *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976. See also 27 HARV. L. REV. 761. It is doubtful how far this exception has been recognized heretofore in the English courts. See *Rex v. Thomson*, [1912] 3 K. B. 19; PHIPSON, EVIDENCE, 66.

⁵ The four lords were Earl Loreburn, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Moulton, no one of whom is an English common-law judge.

⁶ It may be that the English law recognizes a special exception to the hearsay rule as to declarations of the alleged parents in all cases in which the question of legitimacy or paternity is in issue, even when these declarations are not so connected with conduct as to be a part of the *res gesta*. See 1 WIGMORE, EVIDENCE, § 269 and cases there cited. The *Aylesford Peerage*, 11 A. C. 1. But see *Legge v. Edmonds*, 25 L. J. Ch. 125.

⁷ For a full and careful discussion of this question see an article by Mr. Eustace Seligman, 26 HARV. L. REV. 146.

⁸ "The proposal to marry and the acceptance of it may, of course, be made by word of mouth, but the making and the acceptance of it are acts, matters of conduct,

conduct, verbal or non-verbal, which affords a strong circumstantial inference⁹ to the truth of an existing fact, apart from the credit of the speaker or actor, is admissible to prove that fact, and not within the hearsay rule at all,¹⁰ are they applying an existing rule, or are they making a new one? And if this is their meaning, is clearness of thought likely to be promoted by cloaking the result, as Lord Shaw does,¹¹ in the obscurity which surrounds the term *res gestæ*?¹²

The common law so feared the misuse of hearsay evidence by the jury that it excluded all declarations which might induce that body to accept the credit of someone not a witness under oath and subject to cross-examination.¹³ Under the exception to this rule as applied in the *Hillmon* case,¹⁴ the only thing that can possibly be taken on the credit of the declarant is the existence of the mental state, and the exception recognizes the necessity of proving this by hearsay evidence.¹⁵ The inference from the mental state to the future act is solely circumstantial with no possibility of the jury taking the truth of that fact on the credit of the declarant. Where, however, the mental state is offered to prove an existing fact, the inference is not solely circumstantial, but there is grave danger of the jury's taking the truth of the fact on the credit of the declarant. In other words, the objection is not to the proof of the mental state, but to the use which is made of it after it is proved.¹⁶ The logical result of the opinions in the House of Lords would seem to be, that wherever the circumstantial inference is sufficiently strong, the danger of the misuse of the evidence by the jury will be disregarded, and the declarations will be admitted. This may be a desirable result,

and strong pieces of evidence on the issue of paternity, inasmuch as they show the character in which the parties regarded the child *en ventre sa mère*, and desired to treat it." Lord Atkinson, p. 740.

"[The] significance [of these declarations] consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father of the child." Lord Atkinson, p. 741.

⁹ For a discussion of the distinction between a circumstantial and a testimonial use of evidence, see 26 HARV. L. REV. 151, 152.

¹⁰ Both Professor Wigmore and Mr. Phipson seem to hold a similar view as to such declarations when admitted merely to prove a mental state, itself in issue. 3 WIGMORE, EVIDENCE, §§ 1715 *et seq.*; PHIPSON, EVIDENCE, pp. 50 *et seq.* Mr. Taylor also considered such declarations as entirely outside the hearsay rule. TAYLOR, EVIDENCE, §§ 580 *et seq.* But see GULSON, PHILOSOPHY OF PROOF, pp. 315, 316. The court in *Commonwealth v. Trefethen*, *supra*, were troubled by similar considerations. 157 Mass. 180, 188, 31 N. E. 961, 964. See also *Cornelius v. State*, 12 Ark. 782, 807.

¹¹ "In a question of *status*, I am of the opinion that such statements, proved to have been made at the time and in the circumstances such as occurred in the present case, are part of the *res gestæ* equally with actual contracts entered into by the deceased or conduct apart from words, both of which contracts and conduct could undoubtedly have been proved." Lord Shaw of Dunfermline, p. 748.

¹² For a discussion of the confusion in the law with regard to the use of this term and the exception it is erroneously used to describe, see THAYER, LEGAL ESSAYS, 207; PRELIMINARY TREATISE ON EVIDENCE, 522, 523; 3 WIGMORE, EVIDENCE, §§ 1745-1797.

¹³ See THAYER, LEGAL ESSAYS, 266; PRELIMINARY TREATISE ON EVIDENCE, 518, 519; CASES ON EVIDENCE, 2 ed., 310, n. 1; PHIPSON, EVIDENCE, 211; 26 HARV. L. REV. 153.

¹⁴ *Mutual Life Ins. Co. v. Hillmon*, *supra*.

¹⁵ See 3 WIGMORE, EVIDENCE, § 1714.

¹⁶ THAYER, CASES ON EVIDENCE, 2 ed., 670, n. 1; LEGAL ESSAYS, 265; 1 WIGMORE, EVIDENCE, § 267.

but it involves a judicial recasting of the hearsay rule, not avowed, nor, apparently, recognized by the Law Lords, and within the scope of legislation rather than judicial decision.¹⁷

THE LIABILITY OF A RE-INSURER. — A recent case in the Court of Appeal marks an important step in the development of the English law of re-insurance.¹ A guarantee society which had re-insured one of its risks, was unable to meet the liabilities arising under this guarantee. It was held that the basis for calculating the re-insurance company's obligations to the guarantee society was not the rateable sum which the guarantee society was able to pay, but was the actual liability of the guarantee society. *In re Law Guarantee Trust and Accident Society, L.*, [1914] W. N. 291.² Although this result is supported by the weight of American authority,³ its adoption by a new jurisdiction must be viewed with regret. It is submitted that there is no ground upon which the rule can be reconciled with the principle that insurance is essentially indemnity.⁴ If the re-insurer's payment of the insurer's full liability were handed over intact to the original insured, who sustained the loss, there could be no objection on this score.⁵ But it is properly held in most jurisdictions that the original insured has no claim upon the proceeds of the re-insurance policy as such.⁶ Consequently if an insolvent

¹⁷ There is, nevertheless, a tendency in some courts and text writers, of whom Professor Wigmore is an eminent example, to approach the hearsay rule from an *a priori* viewpoint. The late Professor James B. Thayer was without doubt the leading exponent of the historical treatment of the rule. PRELIMINARY TREATISE ON EVIDENCE, 522, 523. This difference in attitude seems to explain the conflict of opinion concerning the extent of the exception here under discussion. For a good contrast of the two viewpoints compare the opinions of Sir George Jessel and Lord Justice Mellish in *Sugden v. Lord St. Leonards*, 1 P. D. 154.

¹ The development of the English law of re-insurance was retarded by the Statute of 19 GEO. II, c. 37, § 4 (1746), prohibiting such contracts. It was not repealed until 30 & 31 VICT., c. 23 (1868).

² In one previous case the re-insured was allowed to recover more than his loss, but the only point argued was whether payment of the loss was a condition precedent to recovery. *In re Eddystone Marine Ins. Co.*, [1892] 2 Ch. 423.

³ The American law was established by *Hone v. Mutual S. Ins. Co.*, 1 Sandf. (N. Y.) 137 (1847), *aff'd sub nom.*, *Mutual S. Ins. Co. v. Hone*, 2 N. Y. 235, following two Marseilles Commercial Court cases. (See EMERIGON ON INSURANCES, Meredith's ed., c. 8, § 14.) *Accord*, *Norwood v. Resolute F. Ins. Co.*, 47 How. Pr. (N. Y.) 43; *Blackstone v. Allemania F. Ins. Co.*, 56 N. Y. 104; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; *Goodrich & Hick's Appeal*, 109 Pa. St. 523; *Consolidated, etc. Ins. Co. v. Cashow*, 41 Md. 59; *Strong v. American, etc. Ins. Co.*, 4 Mo. App. 7; see *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 297; *Cashaw v. N. W. National Ins. Co.*, 5 Bliss (U. S.) 476; *Providence, etc. F. Ins. Co. v. Atlanta, etc. F. Ins. Co.*, 166 Fed. 548. *Semble*, *In re Republic Ins. Co.*, 20 Fed. Cas., No. 11,705; *Allemania Ins. Co. v. Firemen's Ins. Co.*, 209 U. S. 326. *Cf.* n. 14 *infra*.

⁴ MAY, INSURANCE, 4 ed., § 2.

⁵ Where the policies of one insurance company are assumed by another, the policyholders may recover against the latter on the principle of *Lawrence v. Fox*, 20 N. Y. 268; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50; *Glen v. Hope M. Ins. Co.*, 56 N. Y. 379.

⁶ *Herckenrath v. American M. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63; *Consolidated, etc. F. Ins. Co. v. Cashow*, *supra*; *Goodrich & Hick's Appeal*, *supra*. One case gives the original insured a right to the proceeds of the policy on the analogy of the creditor's

insurer against whom there is a claim recovers its amount from the re-insurer, he can only be compelled to pay a *pro rata* dividend thereon to the insured. The insolvent estate is not merely indemnified by the re-insurance, but makes a profit equal to the difference between these two payments.⁷

No such bonanza to the re-insured and his creditors is expressly provided for in any of the re-insurance policies which have been litigated. The courts reached the result by construing general terms of the contract. It was clear that the parties never intended payment by the original insurer to be a condition precedent to his recovery from the re-insurer.⁸ Therefore an insolvent insurer who had incurred a loss which he would be unable to pay in full, was at once entitled to recover something from his re-insurer. Unless this recovery were for the full amount of his *liability* to the original insured, there would apparently be an endless multiplicity of suits. The insolvent would recover the amount of the dividend his assets were able to pay. This recovery would constitute a new asset, which must be divided *pro rata* among all the creditors, including the insured. For the amount so paid to the insured, a further claim would arise against the re-insurer, and so on *ad infinitum*. To avoid this multiplicity of suits, the courts compelled the re-insurer to pay the full amount of the liability to the re-insured.⁹ This apparent danger from multiplicity of suits would also afford a plausible ground for the decisions allowing a full recovery against the re-insurer, even though the insolvent re-insured has paid the original insured a dividend before bringing suit.¹⁰ But the courts have preferred to explain these cases as a "necessary consequence" of the insurer's right to recover in full, if he had elected to sue the re-insurer before making any payment at all.¹¹ Is it a *necessary* consequence? A *solvent* insurer has the same right to sue before making payment. Yet if he brings suit after effecting a settlement for less than his full liability, his recovery is confined to the amount of the settlement.¹² This affords a complete indemnity and leads to no

rights in equity to securities given by the principal debtor to the surety. *Hunt v. N. H. Fire U. Ass'n*, 68 N. H. 305, 38 Atl. 145. This must be regarded as erroneous. The creditor derives his right from the presumption that the party ultimately liable to him transferred the securities to the party secondarily liable as a provision for the payment of the debt. But the re-insurer is not ultimately liable to the original insured before the policy is issued and consequently the foundation of the equity is absent.

⁷ This is sometimes disguised under the term "indemnity against liability." But no true indemnity can leave the one indemnified more than whole.

⁸ See *Allemania Ins. Co. v. Firemen's Ins. Co.*, *supra*, 332.

⁹ The principal case seems to have gone on the further ground that the re-insured should recover the amount on which premiums have been paid. But if a house worth \$5,000, insured for its full value, suffers \$3,000 damage, no lawyer would argue that \$5,000 should be recovered because premiums were paid on that amount.

¹⁰ *Providence, etc. F. Ins. Co. v. Atlanta, etc. F. Ins. Co.*, *supra*; *Consolidated, etc. Ins. Co. v. Cashow*, *supra*.

¹¹ It has also been suggested that a recovery of the full amount is justified if the claim against the re-insurer for the full amount was included among the insolvent's assets when the *pro rata* share of the original insured was calculated. *MAY, INSURANCE*, 4 ed., § 11 a. This begs the question, which is whether the insolvent's estate has any right to include a claim for the full amount among its assets.

¹² *Illinois, etc. F. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; *contra*, *Gantt v. American C. Ins. Co.*, 68 Mo. 503.

multiplicity of suits. It seems, therefore, that recovery in full is a necessary consequence of the right to recover in advance, only where the courts feel that any other result would produce interminable litigation.

But in fact the practical difficulty of innumerable suits which turned the courts aside from the fundamental canon for the construction of an insurance contract, was nothing but a figment of the judicial imagination. The total sum of the judgments in this infinite series of suits may be calculated in advance with the aid of a comparatively simple formula.¹³ This amount could be collected in a single action against the re-insurer, which could be brought prior to any payment to the insured. It furnishes an exact equitable measure of the re-insurer's liability, and affords the re-insured every protection which is consistent with the nature of a contract for indemnity against loss.¹⁴ There is therefore no reason why the courts should, by construction, incorporate into the insurance policy a provision that the re-insurer shall be liable to the insolvent re-insured for the full amount of the insolvent's liability.

It is further submitted that if a clause in the policy expressly bound the courts to this construction, it should render the policy void in its inception. The provision would be a direct incentive to the creditors of an insolvent insurance company to destroy all its risks which had been re-insured in a solvent company. Such a contract tempting a man to transgress the law is void.¹⁵

STATE CONTROL OF FOREIGN CORPORATIONS VERSUS THE JURISDICTION OF THE FEDERAL COURTS. — "The judicial power shall extend . . . to controversies . . . between citizens of different states."¹ Within this clause a corporation is treated substantially as a citizen of the state of its incorporation.² But it has long been held that a foreign corporation cannot claim the "privileges and immunities of citizens" within Art. IV., § 2 of the Constitution, and that states other than that of incorporation can totally exclude it or impose such conditions as they choose upon the privilege of doing business within their borders.³

¹³ Let a = total liabilities of insolvent insurer; b = his liability to the insured whose risk has been re-insured; c = assets of the insurer, exclusive of his claim upon the re-insurer. The sum will be represented by the formula $S = \frac{bc}{a-b}$. The mathematics of this may be found worked out in 15 HARV. L. REV. 866.

¹⁴ The above formula, when applied, will be found to require the re-insured to pay in full whenever such payment will enable the re-insured to meet all his obligations. This is probably the state of the facts in the following cases: *In re Republic Ins. Co., supra*; *Allemania Ins. Co. v. Firemen's Ins. Co., supra*. The re-insured therefore will be kept from insolvency arising from the re-insured loss. But if notwithstanding payment in full by the re-insurer the re-insured would remain insolvent, the formula requires the re-insured to pay only the amount which the original insured can recover. The re-insurance would thus leave the estate of the re-insured as well off as if the original risk had never been contracted.

¹⁵ See *Hunt v. N. H. Fire U. Ass'n*, 68 N. H. 305, 309, 38 Atl. 145, 147.

¹ CONSTITUTION, Art. III, § 2.

² See *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545.

³ *Paul v. Virginia*, 8 Wall. (U. S.) 168. See *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 586.

To what extent may a state in the ostensible exercise of these wide powers indirectly impair the jurisdiction of the federal courts as defined in the Constitution and laws of the United States by exerting pressure on foreign corporations to restrain them from invoking that jurisdiction?

Two questions are well settled by the authorities. First, acquisition of permanent and tangible property within another state, with express,⁴ and perhaps with implied,⁵ license, causes a foreign corporation to become "a person within the jurisdiction," entitled to the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Consequently, a subsequent state statute providing for its expulsion for resorting to the federal courts, without likewise providing for terminating the privileges of domestic corporations, is unconstitutional, independently of its interference with the federal courts.⁶ Such might well be the basis of a recent decision which reaches a like result on other grounds. *Western Union Telegraph Co. v. Frear*, 216 Fed. 199 (Dist. Ct., W. D. Wis.).⁷ Second, it is clear that no state statute, nor any agreement made pursuant thereto, can in any way enlarge⁸ or impair⁹ the jurisdiction of the United States courts, if suit is nevertheless brought therein. But it has been held, where a foreign corporation has acquired no permanent tangible property within a state, though having done business therein, that a subsequently passed statute providing for its expulsion upon a resort to the United States courts is not unconstitutional,¹⁰ the reason given being that the corporation having no right to remain, may not avail at the reason of its dismissal. With these decisions it is difficult to reconcile another, holding that if an agreement not to resort to the federal courts be exacted as a condition precedent to the granting of a license to do business within the state, the illegality of such a condition precedent renders unconstitutional the imposition of a penalty for doing busi-

⁴ *Southern Ry. Co. v. Greene*, 216 U. S. 400.

⁵ See concurring opinion of White, J., in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 48.

⁶ *Herndon v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 135; *Roach v. Atchison, T. & S. F. Ry. Co.*, 218 U. S. 159. A license to do business issued to a foreign corporation may sometimes also amount to a contract not to discriminate against it, which the state cannot constitutionally impair by later legislation. *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103. *Quare*, if it would not be discriminatory to penalize the exercise of the right to invoke federal jurisdiction only in those cases where it arises by virtue of the foreign citizenship of the corporation, in which cases the act would not be capable of application to domestic corporations?

⁷ See note 11, *infra*. For a statement of this and the other principal case, see RECENT CASES, p. 320.

⁸ See *Southern Pacific R. Co. v. Denton*, 146 U. S. 202.

⁹ See *Union Bank of Tennessee v. Jolly's Adm'rs*, 18 How. (U. S.) 503; *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Insurance Co. v. Morse*, 20 Wall. (U. S.) 445; *David Lupton's Sons v. Automobile Club of America*, 225 U. S. 489.

¹⁰ *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246. Though the distinction was not taken in these cases, it has later been said that ownership of tangible property and not merely the ownership of business good will is required to make a foreign corporation "a person within the jurisdiction." See *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 88. A possible reason for this somewhat unsatisfactory distinction is that good will depends for its value solely upon the privilege of doing business within the state, a privilege in itself within the absolute control of the sovereign. See *National Council v. State Council*, 203 U. S. 151, 163.

ness without the license.¹¹ This case is not only not overruled¹² by the cases last cited, but has recently been cited with approval.¹³ The net result seems to be that it is constitutional to use an absolute power of exclusion or expulsion to punish a failure to refrain from federal rights, but unconstitutional to bring the same pressure to bear to induce the making of an agreement whose vice is its tendency toward the same result.

If, then, it be unconstitutional to require agreement to a condition not to resort to the federal courts, it must be because the condition is of itself unconstitutional. Accordingly, it would seem that the presence of such a condition in a license issued to a corporation upon its entrance into a state could not prevent it, upon the acquisition of property, from becoming "a person within the jurisdiction" under the protection of the Fourteenth Amendment, nor thereafter operate as an infirmity existing in the license *ab initio* to take it out from such protection. However, a recent case, wherein a corporation had acquired property under a license terminable upon a resort to the United States courts, holds that upon later breach of the condition the corporation ceased to be a person within the jurisdiction, and so allows this discriminatory expulsion. *State ex rel. Kimberlite Mining & Washing Co. v. Hodges*, 169 S. W. 942 (Ark.). Even if the Fourteenth Amendment had not been violated, the result seems doubtful in the present state of the authorities. The cases permitting the expulsion of foreign corporations for seeking the federal courts¹⁴ have recently been cited only to be distinguished,¹⁵ and it has since been held that a state cannot, by the threatened exercise of an absolute power of prohibiting the carrying on of intrastate business indirectly extort contributions measured by the interstate business of a company engaged in both.¹⁶ More recent language of the court recognizing the inviolability of the constitutional right to invoke federal jurisdiction in proper cases,¹⁷ and in another place, hinting at the unconstitutionality of imposing upon the entrance of foreign corporations conditions violating constitutional rights,¹⁸ makes one wonder whether indirect state attack upon the right to resort to federal courts will any longer be permitted.¹⁹

¹¹ *Barron v. Burnside*, 121 U. S. 186. The principal federal case based its result on this decision although the corporation had not expressly agreed in advance not to sue in the federal courts.

¹² See *Security Mutual Life Ins. Co. v. Prewitt*, *supra*, 253.

¹³ See *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 36.

¹⁴ See note 10, *supra*.

¹⁵ See *Harrison v. St. Louis & San Francisco R. Co.*, 232 U. S. 318, 333; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 45.

¹⁶ *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146. These cases are perhaps explainable on the ground that the inseparability of the interstate and intrastate business made the prohibition of the latter a burden upon the former. See *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 85, 86.

¹⁷ "... The states are in the nature of things without authority to penalize or punish one who has sought to avail himself of the federal right of removal on the ground that the removal asked was unauthorized or illegal." White, C. J., in *Harrison v. St. Louis & San Francisco R. Co.*, *supra*, at 329.

¹⁸ "For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law. . . ." Day, J., in *Baltic Mining Co. v. Massachusetts*, *supra*, 83.

¹⁹ For a general discussion of similar conflicts between state and federal powers, see an article entitled "Nullification by Indirection," 23 HARV. L. REV. 441.

RIGHT OF MASTER, LIABLE UNDER EMPLOYERS' LIABILITY ACT, TO REIMBURSEMENT FROM ONE WHO INJURES SERVANT. — Though recovery has almost invariably been granted to anyone who has been intentionally injured by being deprived of a contractual or similar right, through action upon a third party,¹ nevertheless, except in the historically anomalous suits for loss of services,² if such injury to the plaintiff was negligent and unintentional, though occasioned even by an intentional injury to a third person, recovery has generally been denied.³ Accordingly when an employer is compelled, under an employers' liability act, to compensate his employee for an injury caused by the negligence of a third person, it is no surprise that a recent New Jersey case denies the right of the employer to recover from the tortfeasor. *Interstate Telephone and Telegraph Co. v. Public Service Electric Co.*, 90 Atl. 1062.⁴ But, with all question of the policy of the employers' liability act aside, there seems to be no reason why recovery should be denied. In civil actions, since no question of punishment or correction is involved, no general distinction should be made between intentional injuries and injuries caused by acting without "due care" when damage to the plaintiff is a foreseeable result.⁵ If the duty and the causation are clear, it is not a valid reason for denying recovery that the damage would not have occurred but for the existence of some obligation or some chance of profit.

Often, however, where the plaintiff thus suffers loss from injury to a third party, the injury to the plaintiff is not separate. Thus where the plaintiff has insured the injured party, if it is a true contract of indemnity, the operation of the contract is merely to shift the burden of the primary injury to the plaintiff's shoulders. In such cases, as, for example, marine and fire insurance, the plaintiff's redress should therefore be by subrogation,⁶ since to allow an independent recovery would make the defendant liable in two actions for a single harm.⁷ But in con-

¹ *Lumley v. Gye*, 2 L. & B. 216; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; *Walker v. Cronin*, 107 Mass. 555; *Hughes v. McDonough*, 43 N. J. 459; *McNary v. Chamberlain*, 34 Conn. 384.

² Husband suing for injury to wife: *Brockbank v. Whitehaven Junction Ry. Co.*, 7 H. & N. 834; *Mewhirter v. Hatten*, 42 Ia. 288. Father suing for injury to child: *Dennis v. Clark*, 2 Cush. (Mass.) 347; *Dixon v. Bell*, 5 M. & S. 198. See *Hall v. Hollander*, 4 B. & C. 660. Master suing for injury to servant: *Ames v. Union Ry. Co.*, 117 Mass. 541; *Berringer v. Great Eastern Ry. Co.*, 4 C. P. D. 163. The fact that the wife cannot sue for an injury to her spouse, nor a child for an injury to its parent, demonstrates that these cases are not distinguishable on the ground that the injury to the plaintiff is by deprivation of a relational as distinguished from a contractual right. *Feneff v. New York Central & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436.

³ *Anthony v. Slaid*, 11 Metc. (Mass.) 290; *Byrd v. English*, 117 Ga. 191, 43 S. E. 419; *Dale v. Grant*, 34 N. J. L. 142; *Davis v. Condit*, 124 Minn. 365, 144 N. W. 1089; see 27 HARV. L. REV. 689. But see *Metallic Compression Casting Co. v. Fitchburg Ry. Co.*, 109 Mass. 277; *Cue v. Breeland*, 78 Miss. 864, 29 So. 850. The problem of liability when the plaintiff has been injured through being deprived of a chance of gain, is considered in the discussion of the case of *Central Georgia Power Co. v. Stubbs*, 80 S. E. 636 (Ga.), 27 HARV. L. REV. 689.

⁴ A fuller statement of this case appears in RECENT CASES, p. 333.

⁵ See POLLOCK, TORTS, 9 ed., p. 22.

⁶ See *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312; *Home Mutual Ins. Co. v. Oregon Ry. & Nav. Co.*, 20 Ore. 569, 26 Pac. 857.

⁷ That subrogation becomes valueless in cases when some rule of law bars the insured from recovering from the tortfeasor, does not demonstrate that the harm to the

tracts for the payment of a compensation, not of an indemnity, where, as in life and accident insurance, payment cannot be accurately adjusted to the loss, the injury to the plaintiff is clearly additional to that to the party directly harmed, and subrogation is properly denied.⁸ Unfortunately, direct remedy for the plaintiff's separate injury has been likewise refused.⁹ In the case of employers' liability, the facts that the compensation is determined according to an arbitrary scale, and that only partial wages are paid during incapacity, strengthened by the analogy to life and accident insurance, clearly show that the compensation is in the nature of a bonus and not an indemnity.¹⁰ So no remedy by subrogation can be given. But if the fact of the servant's employment is known, even under an optional form of employers' liability act, it is abundantly foreseeable that an injury to him might involve an injury to his master. This injury to the master is therefore the proximate result of negligent injury to the servant,¹¹ and a duty of care to the master likewise arises. Thus, although the principal case is in accord with the weight of authority in analogous cases, the principles of tort liability demand that direct recovery be granted.

But does the policy of employers' liability acts change this common law situation? The broad scope and the essentially remedial nature of these acts demand that the fundamental purpose of the legislation be made operative by a liberal construction.¹² It is generally

insurer is separate; it merely means that the harm which the insured has been able to shift to the insurer is an injury for which the law allows no recovery.

⁸ Life insurance: *Insurance Co. v. Brame*, 95 U. S. 754. Accident insurance: *Ætna Life Ins. Co. v. J. B. Parker & Co.*, 96 Tex. 287, 72 S. W. 168, 621.

⁹ *Conn. Mutual Life Ins. Co. v. New York, etc. Co.*, 25 Conn. 265.

¹⁰ See RUEGG, *EMPLOYERS' LIABILITY*, 6 ed., 360. For the schedule of payment under the New Jersey act in force in the principal case, see N. J. P. L., 1911, p. 133.

¹¹ See Jeremiah Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, pp. 114-123.

¹² Many courts have enunciated a rule that statutes in derogation of the common law must be strictly construed. See *State v. Cowper*, 120 Tenn. 549, 533, 113 S. W. 1048, 1049; *Dean v. Metropolitan E. R. Co.*, 119 N. Y. 540, 547. A *dictum* in an old case applies this rule to a special statute very similar to an employers' liability act. See *Beeson v. Busenbark*, 44 Kan. 619, 623, 25 Pac. 48, 49. The trend of present-day opinion, however, is increasingly against any such principle. See Professor Pound, "Common Law and Legislation," 21 HARV. L. REV. 283. Furthermore, it is a generally accepted doctrine that remedial statutes must be construed liberally and so as to make the intended remedy effective. See *Becker v. Brown*, 65 Neb. 264, 269, 91 N. W. 178, 180; *Goss v. Cahill*, 42 Barb. (N. Y.) 310, 315. Employers' liability acts, though imposing on the employer a new liability, are essentially remedial legislation. Cf. *Va. & S. W. Ry. Co. v. Clower*, 102 Va. 867, 871, 47 S. E. 1003, 1004. Again, the large application of these acts makes a strong reason why they should be broadly interpreted. See Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 250, 330. In determining the extent of "accidents arising out of and in the course of the employment," the courts have unfailingly construed the acts very liberally. *Trim District School Board v. Kelley*, [1914] A. C. 667, see especially the opinion of Lord Haldane on p. 680; *Riley v. William Holland & Sons*, [1911] 1 K. B. 1029; *Moore v. Manchester Liners*, [1910] A. C. 498; *In re Hurler*, 104 N. E. 336 (Mass.); *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458. In two decisions, though maintaining the collateral common-law rights of the employees, it was expressly declared that a liberal construction in favor of the employees must be given these acts. See *Ryalls v. Mechanics Mills*, 150 Mass. 190, 193, 22 N. E. 766, 767; *Colo. Milling, etc. Co. v. Mitchell*, 26 Colo. 284, 287, 58 Pac. 28, 30. Indeed it has been argued that these acts have created a relational status between employer and employee. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND*, 281-283.

conceded that this purpose is to cause the employer, who is able to transfer the burden to the consumer,¹³ to give a prompt and certain pecuniary relief to the workman who has been injured in his employment.¹⁴ Though to allow the employer to recover from one employee for the negligent injury to another for which the act has forced the employer to pay compensation, would undeniably be to place upon the employee the burden of an industrial injury, the acts do not contemplate giving the employee any other relief than compensation for industrial casualties. *A fortiori*, a negligent stranger is not given any protection by the act.¹⁵ That many of the recent statutes have expressly given to the employer, to the extent of the compensation paid, a right of recovery over against the tortfeasor, yet, with but three exceptions, have not distinguished the negligent servant from the stranger, strengthens these conclusions.¹⁶ However, it is more consistent economically to cause the industry as a part of the cost of production not only to supply relief to the incapacitated servant, but to assume the burden of all industrial injury of its employees. Hence, as legislation, statutes which forbid recovery by the employer against his negligent employee are preferable. Still the right of the master to recover on the principles of tort liability is not denied by the present statutes.¹⁷

TAXPAYER'S SUIT TO ENJOIN ELECTIONS ALLEGED NOT TO BE LEGALLY AUTHORIZED. — When a public official purporting to perform the duties of his office commits an illegal act, not only may the state call him to account by the exercise of the so-called prerogative writs,¹ but equity, at the suit of any person injured by the wrongful proceedings, will enjoin the violation of the plaintiff's rights.² The authorities are in confusion,

¹³ 2 TAUSSIG, PRINCIPLES OF ECONOMICS, 326.

¹⁴ See Professor Wambaugh, "Workmen's Compensation Act," 25 HARV. L. REV. 129, 132.

¹⁵ This problem is dealt with at length by Jeremiah Smith in his article on "Sequel to Workmen's Compensation Acts," *supra*.

¹⁶ Recovery over to the extent of the compensation paid is granted the employer without qualification in the following statutes: CAL. L. 1913, ch. 176; CONN. L. 1913, ch. 138; ILL. BILL 841, 1913; IOWA L. 1913, ch. 147; KAN. L. 1911, ch. 218; NEB. L. 1913, ch. 198; NEV. L. 1913, ch. 198; N. J. L. 1913, ch. 95; R. I. L. 1912, ch. 831; WIS. L. 1911, ch. 50; 60 & 61 Vict., c. 37, § 6. In New York, the right of subrogation is limited to cases where the tortfeasor was not in the same employ. L. 1913, ch. 81; CONSOLIDATED LAWS, ch. 67. In Oregon and Washington the right of recovery over is limited to accidents away from the employer's plant. ORE. L. 1913, ch. 112; WASH. L. 1911, ch. 74.

¹⁷ The opinion in the principal case describes the compensation paid the employee as past wages, and therefore not subject to recovery. This, it is submitted, overlooks the fact that the obligation is contingent, be the compensation in the nature of wages or otherwise, and therefore the liability thrust upon the employer is a damage which he would not otherwise have suffered.

¹ For a learned discussion of the relation of injunction to the legal prerogative writs, see *State v. Lord*, 28 Ore. 498, 510, 43 Pac. 471, 474. When the plaintiff has the alternative to apply for mandamus, he may be denied equitable relief. *Larcom v. Olin*, 160 Mass. 102, 35 N. E. 113.

² *Crampton v. Zabriskie*, 101 U. S. 601; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738; *Board of Liquidation v. McComb*, 92 U. S. 531.

however, as to the extent of the latter jurisdiction in such cases and the theory upon which the right to relief is based. Particularly conflicting are the decisions upon the right of a taxpayer to enjoin unauthorized acts by a state official which involve the expenditure of public funds and thereby affect the burden of taxation borne by the plaintiff. In a recent New York case a taxpayer was refused an injunction to restrain state election officials from proceeding with an election of delegates to a constitutional convention which was alleged not to be legally authorized. *Schieffelin v. Komfort*, 212 N. Y. 520.³

In suits of this nature the jurisdiction of equity rests not upon the defendant's breach of a "public trust," although this is sometimes stated,⁴ for of course it is not the sort of a technical trust the existence of which gives equity jurisdiction. It rests instead upon the invasion of the plaintiff's right of substance, or, as it is commonly expressed, a property right. This is well shown by the fact that although there may be a breach of public duty, no injunction will be granted if the taxpayer can show no pecuniary damage.⁵ And as the courts cannot enjoin the state, either as such or as represented in its executive officers,⁶ relief must be denied where the injury to the plaintiff is being caused by officers acting under valid authority but in abuse of the discretion given them.⁷ If, however, the act complained of is plainly unauthorized by law, as where it is the execution of an unconstitutional statute, the official in committing it does not represent the state and is as much subject to the decree of the court as a private person. In the principal case, illegality of both kinds was alleged: in counting the ballots cast for and against holding the convention, and in having held the first election under an unconstitutional statute. Equity could not take jurisdiction upon the first ground, not only because it was a matter of official discretion, but also because the court was bound to follow the facts as to the number of votes cast which had been determined by the executive department. But on the latter ground equity had jurisdiction.

Although jurisdiction exists, before granting injunctive relief, the court should balance any possible public harm its decree might cause against the injury done the plaintiff. It is obvious that there are cogent

³ See, for a full statement of this case, this issue of the REVIEW, page 327.

⁴ See *City of Chicago v. Collins*, 175 Ill. 445. This was also stated to be the ground of the jurisdiction in 26 HARV. L. REV. 455.

⁵ Against state officials: *State v. Pennoyer*, 26 Ore. 205, 37 Pac. 906; 28 Ore. 498, 43 Pac. 471; *Sherman v. Bellows*, 24 Ore. 553, 34 Pac. 549; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683; *Whitbeck v. Hooker*, 133 N. Y. Supp. 534; *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35; and see *Slack v. Jacob*, 8 W. Va. 612; *Frost v. Thomas*, 26 Colo. 222, 56 Pac. 899. Against county or municipal officers: *Ex parte Lumsden*, 41 S. C. 553, 19 S. E. 749; *Morgan v. Wetzel County Court*, 53 W. Va. 372, 44 S. E. 182; *Jones v. Black*, 48 Ala. 540; *Fletcher v. Tuttle*, *supra*; *In re Reynolds*, 202 N. Y. 430, 96 N. E. 87.

⁶ See the authorities digested in a note to *Louisville & N. R. Co. v. Burr*, 63 Fla. 491, 58 So. 543, in 44 L. R. A. N. S. 189.

⁷ See *Hutchinson v. Skinner*, 49 N. Y. Supp. 360; *Long v. Johnson*, 127 N. Y. Supp. 756; *Duncan v. Heyward*, 74 S. C. 560, 54 S. E. 760. It will not do, however, to say that only ministerial acts may be enjoined. Granted that the statute is unconstitutional, the amount of discretion purported to be given by the void act is immaterial. But see *Noble v. Union R. L. R. Co.*, 147 U. S. 165, 172, following Mr. Justice Bradley, in *Board of Liquidation v. McComb*, *supra*, 541.

arguments of policy against subjecting state officials to suits of this character. The public interest against allowing the hands of officials to be tied by constant litigation is so overwhelming that the few cents loss any taxpayer may suffer sinks into insignificance. It is submitted that this is the real justification for the decisions which, as the apparent weight of authority, sustain the New York case, but which go on the ground that no jurisdiction exists to enjoin state officers, rather than that objections exist as to its exercise.⁸ Yet in this particular instance the gravity of the issue of the legality of holding the constitutional convention, and the expense involved, make it a close case from the point of view of the balance of convenience. The court supports its conclusion by the inference that since the legislature has expressly authorized taxpayers' suits against county and municipal officers, it has thereby denied them against state officials.⁹ The argument is probably sound as to New York, for the courts there had previously refused injunctions against even local officers;¹⁰ but in most jurisdictions such a statute would be merely declaratory, for taxpayers are generally allowed to enjoin city and county officials.¹¹ In view of the lesser public interest in their case, the result seems proper upon the balance of convenience. Moreover, unless they are acting in a strictly governmental capacity, under authority delegated to the municipality from the sovereign, the courts do not proceed upon the erroneous impression that they are being asked in effect to enjoin the state. The injunction therefore lies as readily as where a stockholder of a private corporation restrains mismanagement.¹² The principal case, although perhaps correct on the

⁸ Taxpayers were denied injunctions against the following acts involving the financial interest of the state: Borrowing money, *Thompson v. Commissioners of Canal Fund*, 2 Abb. Pr. (N. Y.) 248. Leasing public lands, *Taylor v. Montreal Harbor Commissioners*, 17 Rap. Jud. Que. C. S. 275. Election proceedings, *People v. Mills*, 30 Colo. 262. General maladministration, *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067. In the following similar cases the decision was rested in part upon the inability of the plaintiff to maintain the action: Enforcing income tax law, *State v. Frear*, 148 Wis. 456, 134 N. W. 673. Election proceedings, *State v. Thorson*, 9 S. D. 149, 68 N. W. 202. Leasing public lands, *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186. Opening schools, *Hutchinson v. Skinner*, *supra*. Maintaining grain inspection bureau, *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37. General maladministration, *Long v. Johnson*, *supra*; *Novarro v. Post*, 5 Porto Rico Fed. 61. See also *Duncan v. Heyward*, 74 S. C. 560, 54 S. E. 760; 78 S. C. 227, 58 S. E. 1095; *Edwards v. Lesueur*, 132 Mo. 410, 33 S. W. 1130. But under similar circumstances injunctions were granted against the following acts: Election proceedings, *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963; *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424. Selling state property, *Mott v. Pa. R. Co.*, 30 Pa. St. 9. Operating a canal, *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327. Receiving scrip for taxes, *Auditor v. Treasurer*, 4 S. C. 311. Paying expenses of public building, *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374.

⁹ NEW YORK CODE OF CIVIL PROCEDURE, § 1925; GENERAL MUNICIPAL LAW, § 51.

¹⁰ *Roosevelt v. Draper*, 23 N. Y. 318.

¹¹ *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314; *Peck v. Spencer*, 26 Fla. 23, 7 So. 642; *Crampton v. Zabriskie*, *supra*; *White v. County Commissioners*, 13 Ore. 317; *Lanire v. Padgett*, 18 Fla. 842. But see *Pierce v. Smith*, 48 Kan. 331, 29 Pac. 565.

¹² See POMEROY, *EQUITABLE REMEDIES*, § 326; DILLON, *MUNICIPAL CORPORATIONS*, 5 ed., § 1580. An additional reason that may be suggested for the distinction between suits against state officers and local ones is the possibility that the former may be sued by different taxpayers in several counties at once, with the resulting expense of defending a number of suits at the same time.

balance of convenience, does not go on that ground, but leaves the unfortunate impression that there is a jurisdictional objection against enjoining state officials in any case.

ALIEN ENEMIES IN THE COURTS OF A BELLIGERENT. — The European war, coming as it does after a prolonged period of free commercial intercourse between the great powers, has developed acutely the problem of what status shall be given in the courts to an alien enemy who is allowed to remain in a belligerent country after the outbreak of hostilities. A Canadian court has recently held that such an individual may recover in tort for a personal injury. *Topay v. Crow's Nest Pass Coal Co.*, 29 West. L. R. 555 (B. C.). An English court has refused to stop proceedings against a German insurance company. *Robinson & Co. v. Continental Ins. Co.*, 31 T. L. R. 20 (K. B. Div.).

War necessarily contorts the normal legal situation. Broadly speaking, all intercourse between citizens of the belligerent nations must cease. In the courts there will of course be no remedy whatsoever for the damage incurred by acts of hostility,¹ and for obligations that were entered into before the war and that mature either before or during it all remedies in favor of non-resident aliens must be suspended until peaceful relations have been restored.² But if an overstatement be made of the general principle,³ attention may be diverted from certain important distinctions. It seems clear, for example, that belligerency ought not to alter the situation of an alien defendant, and operate in his favor by suspending the remedy against him. If he is within the jurisdiction and subject to personal service it would be odd reasoning that placed him on a better footing than a loyal citizen.⁴ And this principle carried to its logical conclusion leads to the result that if the alien enemy is non-resident he is subject to all the usual remedies that are available against a non-resident defendant.⁵ On principle it would seem that in this latter case the court ought to make sure of its being physically possible for the defendant to appear by attorney or in person, and to produce his evidence, and also that the proceeding ought to constitute an implied license for him to enter the jurisdiction if he chose to appear in person.⁶ Otherwise the judgment would be purely confiscatory in effect, a policy which should be pursued, if at all, only by the executive. To refuse him the immediate payment of costs if he wins would also seem unjustifiable, and not answered by the suggestion that such a policy would furnish resources to the enemy, for by hypothesis an equivalent loss has already been inflicted.⁷ All the customary defenses

¹ *Juando v. Taylor*, 13 Fed. Cas., No. 7558.

² See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 44-52. See also *Driefontein*, etc. *Co. v. Janson*, [1900] 2 Q. B. 339, 346; affirmed, [1902] A. C. 484.

³ Such an overstatement was made by Lord Davey in *Janson v. Driefontein*, etc. *Co.*, *supra*, [1902] A. C. 484, 499, and caused the court not a little difficulty in the recent English case.

⁴ *McVeigh v. United States*, 11 Wall. (U. S.) 259, 267.

⁵ *Dorsey v. Kyle*, 30 Md. 512.

⁶ There is a suggestion favorable to this view in the recent English case at p. 21.

⁷ See the recent English case where the query was raised at p. 22.

including set-off must be allowed the alien defendant,⁸ but to permit counterclaim would violate the general principle that affirmative remedies must be suspended during hostilities.⁹

The Canadian case raises the problem of whether there are any circumstances under which a court will grant relief to an alien enemy plaintiff. It is clear that no relief can be demanded of right. Even in peace an alien has no right enforceable by action to enter the territory of another sovereign,¹⁰ and in war it would seem to be fundamental that a sovereign may arbitrarily restrict or exclude an adherent of the enemy as he pleases. But as soon as the warring nation expressly or by acquiescence allows an alien enemy to remain within its borders without restrictions as to his rights at law, the situation must be viewed in a new light. Such permission connotes protection. One softening of the strict logical consequences of belligerency is already established in the rule that if aliens are caught in foreign territory by the outbreak of hostilities they will be allowed a reasonable time for the removal of their property.¹¹ And there is further analogy in the doctrine that where an alien enemy is licensed to trade, all his disabilities are removed.¹² It cannot be denied that there are cases which indicate that all alien enemies are under total disability to sue, but almost without exception they have to do with non-resident plaintiffs.¹³ On the other hand, there is a distinct body of authority which holds that if the alien is allowed to remain he should be granted all the protective remedies that are essential to the scope of intercourse allowed him,¹⁴ — a view which harmonizes with the modern desire for raising the standard of international ethics in warfare.

WILL A VOID ASSIGNMENT OF THE ORIGINAL LEASE CONSTITUTE A SURRENDER BY OPERATION OF LAW? — The answer to this question turns upon the theory underlying surrenders by operation of law. In a recently decided case in the Supreme Court of Illinois the court answered it in the negative. *Johnson v. Northern Trust Co.*, 106 N. E. 814. A tenant under a term for years with the lessor's con-

⁸ See *McVeigh v. United States*, *supra*, at p. 267; *Seymour v. Bailey*, 66 Ill. 288, 297.

⁹ Although, as we submit *infra*, an alien enemy who is permitted to remain in the country may sue in the courts as plaintiff, the defendant here would be in the country solely for a special purpose and therefore not entitled to all the rights of those who have been allowed to remain for all purposes.

¹⁰ *Poll v. Lord Advocate*, 35 Sc. L. Rep. 637.

¹¹ *Cf. The John Gilpin*, 13 Fed. Cas., No. 7,344.

¹² See *United States v. Cement*, 27 Fed. Cas., No. 15,945.

¹³ *Anthon v. Fisher*, 2 Doug. 649, n.; *Brandon v. Nesbitt*, 6 T. R. 23; see *Russ v. Mitchell*, 11 Fla. 80.

¹⁴ *Maria v. Hall*, 1 Taunt. 33, n.; *Clarke v. Morey*, 10 Johns. (N. Y.) 69. Chancellor Kent in delivering the opinion in this case brought out the important point that if the alien is within the jurisdiction when war breaks out he may stay with implied permission until expressly ordered away. In the principal Canadian case, where the plaintiff was expressly permitted to stay by an Order in Council, *a fortiori*, the result should be clear. See *Russell v. Skipwith*, 6 Binn. (Pa.) 241; 1 AMER. J. INT. LAW, 463; HALL, INT. LAW, 6 ed., 388.

sent assigned the lease to "the Merrimack Building Company," which entered into possession and made valuable improvements. Subsequently it was discovered that there was no law under which the company could have incorporated, and under such circumstances the law of Illinois allows a collateral attack.¹ The lessor claimed a merger of the term in his reversion through a surrender by operation of law. But the court held that the assignment being void for want of a grantee the term still remained in the original tenant although an equitable interest passed to the associates in the company.²

The effect of intent on surrenders by operation of law has long been in dispute. At least a few of the earlier cases based the doctrine on the apparent intent of the parties.³ But in *Lyon v. Reed*, Baron Parke laid down the rule that the act itself constituted the surrender on plain grounds of estoppel, that it was not the result of intention but took place independently and even in spite of intention.⁴ This has become the established principle in some jurisdictions.⁵ But a strict application of it would have worked great hardship in those cases where the new lease failed to pass the interest which the parties contemplated, although some interest did pass; so the courts refused to apply it there, saying that "if the grant fails contrary to the intent of the parties, it seems unreasonable that an absolute surrender should be presumed to have been intended."⁶ And the tendency in recent times has been to get away entirely from the doctrine of estoppel.⁷

What therefore is the situation when the new lease is completely void? It has never been doubted that a new valid lease to the original tenant constitutes a surrender by operation of law.⁸ The acts of the parties are so inconsistent with the existence of the original lease that the law will presume a surrender to have been made.⁹ But if the second lease is void and consequently it would be unreasonable to make such a presumption (since the parties could not intend that the accept-

¹ *Imperial Building Co. v. Board of Trade*, 238 Ill. 100, 87 N. E. 167.

² If the legal title remained in the original tenant, an equitable interest in the term for years would pass to the associates, (since they in substance dealt with the assignor and paid the consideration for the assignment) on the equitable principle that "equity regards that as done which ought to be done." See *STORY, EQUITY JURISPRUDENCE*, 11 ed., § 64 g. But if there was a surrender they could acquire no such rights as against the landlord, but could recover merely to the extent of the money paid out for improvements, although it is submitted that they still might attack the surrender on the ground that equity will prevent a merger where it would work injustice. See *POMEROY, EQUITY JURISPRUDENCE*, 3 ed., § 786 *et seq.*

³ See *Wilson v. Sewell*, 4 Burr. 1975, 1980; *Davidson d. Bromley v. Stanley*, 4 Burr. 2210, 2213.

⁴ See *Lyon v. Reed*, 13 M. & W. 285, 306.

⁵ See *Stern v. Thayer*, 56 Minn. 93, 96, 57 N. W. 329; *Welcome v. Hess*, 90 Cal. 507, 512.

⁶ *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702; *Doe d. Biddulph v. Poole*, 11 Q. B. 713. See *Coe v. Hobby*, 72 N. Y. 141, 146.

⁷ See *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569, 579; *Smith v. Kerr*, 108 N. Y. 31, 36; *Beall v. White*, 94 U. S. 382, 389; *TAYLOR, LANDLORD AND TENANT*, 9 ed., § 512. See also 22 HARV. L. REV. 55.

⁸ *Wilson v. Sewell*, *supra*; *Van Rensselaer's Heirs v. Penniman*, *supra*. See *VIN.'S ABRIDG.*, tit. "Surrender," f. (g); *TAYLOR, LANDLORD AND TENANT*, 9 ed., § 512.

⁹ See *Van Rensselaer's Heirs v. Penniman*, *supra*, p. 579.

ance of the bad lease should constitute a surrender of the good one), the courts refused to do so and denied a surrender.¹⁰ Of course in both these cases the same result might be reached on some doctrine of estoppel.¹¹ But it is submitted that the above reasoning is more conclusive and has the added merit of explaining apparently inconsistent authorities in other cases. Where the lessor with the consent of the original lessee gives a new void lease to a third party who takes possession and pays rent there will be no surrender,¹² although if the lease had been good it would have been otherwise.¹³ Yet the case clearly falls within the doctrine of estoppel, for the change of possession consented to by all the parties is an act entirely inconsistent with the existence of the original tenancy. Nor is there any sound distinction between that and the case of an assignment of the lease with the consent of the landlord and followed by a change of possession, as in the principal case. In the one case the tenancy was created by a new lease directly from the landlord, while in the other, by the assignment of the old lease with the consent of the landlord to hold the assignee as his tenant. So if the assignment is good there will be a surrender.¹⁴ But if void it would follow that there should be none, if we look at the intent of the parties, although all the parties are as much estopped as if the new lease had come directly from the landlord. The principal case in denying a surrender would therefore seem to be merely carrying the theory of surrender as based on apparent intent to its logical conclusion, and may mark the collapse of estoppel as the alleged basis of surrenders by operation of law.

RESCISSION WITHOUT PUTTING DEFENDANT IN *STATU QUO*. — Upon the rescission of a contract induced by fraud, a recent New Hampshire case held that the plaintiff might recover a part of what he had given to the defendant without at the same time restoring the consideration he himself had received. *Page Belting Co. v. F. H. Prince & Co.*, 91 Atl.

¹⁰ *Davison d. Bromley v. Stanley*, *supra*; *Roe d. Berkeley v. Archbishop of York*, 6 East 86; See *Wilson v. Sewell*, *supra*, p. 1980; *Van Rensselaer's Heirs v. Penniman*, *supra*, p. 579; *Knight v. Williams*, [1901] 1 Ch. 256, 257; VIN'S ABRIDG., tit. "Surrender," f. (7); BROWN, STATUTE OF FRAUDS, 5 ed., § 49.

¹¹ For if the tenant accepts a new lease, there is a representation that the landlord has the power to give it; hence he is estopped to set up its invalidity due to the existence of the original lease. *Stern v. Thayer*, *supra*, p. 96; *Welcome v. Hess*, *supra*, p. 512. But if the second lease is void, it would seem that there being no change of possession or other acts inconsistent with the continuance of the original lease, there can be no estoppel, and the original lease stands.

¹² *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400. See BROWN, STATUTE OF FRAUDS, 5 ed., § 54. Where the new tenant is *cestui que trust* of the original tenant it has been held that there is no surrender. *Zick v. London United Tramways, Limited*, [1908] 2 K. B. 126. Moreover, if there is fraud in giving the new lease, there is no surrender of the old one. *Bruce v. Ruler*, 2 M. & R. 3.

¹³ *Nickells v. Atherstone*, 10 Q. B. 944; *Davison v. Gent*, 1 H. & N. 744; *Drew v. Billings-Drew Co.*, 132 Mich. 65, 92 N. W. 774; *Morgen v. McCollister*, 110 Ala. 319, 20 So. 54; *Whitney v. Meyers*, 1 Duer (N. Y.) 266.

¹⁴ *Thomas v. Cook*, 2 B. & A. 119; *Wallace v. Kennelly*, 47 N. J. L. 242; *Bowen v. Haskell*, 53 Minn. 480.

961 (N. H.).¹ The case may at first appear extremely startling, for it would seem to disregard at the same time two propositions: *viz.*, that a contract cannot be rescinded in part and affirmed in part and also that in rescission the defendant must be placed in *statu quo*. But the result in fact, instead of being purely arbitrary, shows a thoughtful and correct application of the principles underlying this class of cases.

Restitution throughout the law is based on the equitable principle forbidding unjust enrichment.² Quasi-contractual rights as well as restitution in equity are accordingly really of an equitable nature, although the remedy is furnished by courts of law which have acquired their jurisdiction under the fiction of an implied promise.³ The rights being of this character, the remedies necessarily partake of it also and hence if a plaintiff demands such equitable relief from the court, it is proper that he himself should do equity. Consequently, as it has often occurred that a plaintiff who demanded restitution had himself received some consideration from the defendant, he has been required, lest he be unjustly enriched at the defendant's expense, to do equity by restoring it, that is, to put the defendant in *statu quo*.⁴ But where the court could reach a proper result without this, it did not hesitate to do so, as where the consideration received by the plaintiff was valueless,⁵ or, if it was such that could not be returned in specie, unjust enrichment could be prevented by setting off its money value against recovery from the defendant.⁶

The principal case would seem to be one where it is unnecessary to put the defendant in *statu quo*. The defendant had sold bonds to the plaintiff for a consideration, paid partly in stock and partly in cash. The bonds were of less value than represented, as the plaintiff was forced to realize on them without collecting a large amount of interest. The plaintiff sought to regain merely the stock and the accrued dividends. In order to do equity himself, should he have been required to restore the value of the bonds and demand as well the return of his money payment with interest? The facts of this case show that the cash plus interest in the hands of the defendant is alone equal to or in excess of the proceeds of the bonds retained by the plaintiff. So if the defendant is solvent, the result is equitably the same if the stock alone is regained, and the money claims balanced off, which method avoids the cumbersome process of restoring money to the defendant and immediately bringing action for the same or a greater amount. Such an analysis shows therefore that in substance the whole transaction is rescinded and not merely a part of it, and while the defendant has not been put in *statu quo* in form, still an equitable result has been reached. But in the principal case the defendant was insolvent. Certainly the plaintiff's duty

¹ The parties were contesting claimants in an interpleader suit, but for convenience in discussion we have thus simplified the facts. For a more complete statement, see this issue of the REVIEW, p. 333.

² KEENER, QUASI-CONTRACTS, pp. 16, 19; WOODWARD, QUASI-CONTRACTS, §§ 7-9.

³ KEENER, QUASI-CONTRACTS, p. 14; WOODWARD, QUASI-CONTRACTS, § 2.

⁴ KEENER, QUASI-CONTRACTS, p. 302; WOODWARD, QUASI-CONTRACTS, § 23; Coolidge v. Brigham, 1 Metc. (Mass.) 547.

⁵ Kent v. Bornstein, 12 Allen (Mass.) 342; Martin v. Home Bank, 160 N. Y. 190, 54 N. E. 717.

⁶ Todd v. Leach, 100 Ga. 227, 28 S. E. 43; Richards v. Allen, 17 Me. 296; Day v. New York Central R. Co., 51 N. Y. 583.

to restore is equitably only concurrent with the defendant's duty to repay, and as here the defendant cannot do so in full, the plaintiff acts fairly if he retains what he has. Nor can the defendant's creditors complain of this arrangement. The plaintiff's money is not and, as we have submitted, ought not to become part of the defendant's estate, and so the demand that the latter be put in *statu quo* would remit the plaintiff to his claim for a dividend and gives the creditors an undue advantage at his expense.

Because the requirement that the defendant be put in *statu quo* was a method of reaching a just result in the majority of cases, the idea became to some extent prevalent, that it was always necessary.⁷ Many courts, however, more recently have recognized the underlying equitable principle and have refused to be governed by any wooden rule regardless of the circumstances. Mere failure to replace the defendant in *statu quo* without more will not be a bar where the plaintiff gets no undue advantage by this failure,⁸ and where circumstances allow it, courts have been willing to set off corresponding claims when justice would be done and needless routine avoided.⁹ Thus the result reached by the New Hampshire court, being the one most conformable with the merits of the case, is entirely commendable.

RECENT CASES

ALIENS — STATUS OF ALIEN ENEMIES IN THE COURTS OF A BELLIGERENT. — In an action for personal injuries it appeared that the plaintiff was an alien enemy. The plaintiff was still resident in Canada by permission of certain Orders in Council. *Held*, that the plaintiff can recover. *Topay v. Crow's Nest Pass Coal Co.*, 29 West. L. R. 555 (B. C.).

In an action on an insurance policy it appeared that the defendant was an alien enemy. *Held*, that the plaintiff can recover. *Robinson & Co. v. Continental Insurance Co.*, 31 T. L. R. 20 (K. B. Div.).

For a discussion of the status of an alien enemy in the courts of a belligerent, see NOTES, p. 312.

BANKRUPTCY — PREFERENCES — EFFECT OF RE-TRANSFER TO DEBTOR BEFORE PETITION. — A preferred creditor surrendered his preference to the debtor gratuitously and in good faith before the petition in bankruptcy was filed. The property thus surrendered was wasted by the debtor and never reached the hands of the trustee. In a suit by the trustee to recover the value of this preference, the creditor pleads the surrender. *Held*, that the plea states a good defense. *Lucey v. Matteson*, 32 Am. B. R. 782 (Dist. Ct., N. D., N. Y.).

After adjudication a creditor should surrender his preference to the trustee and not to the bankrupt. *In re Currier*, Fed. Cas., No. 3,492. Between the filing of the petition and adjudication, a creditor making a surrender to the

⁷ *Hunt v. Silk*, 5 East 449; see *Thayer v. Turner*, 8 Metc. (Mass.) 550, 552; *Beed v. Blandford*, 2 Y. & J. 278, 283.

⁸ *Basye v. Paola Refining Co.*, 79 Kan. 755, 101 Pac. 658; *Creveling v. Banta*, 138 Ia. 47, 115 N. W. 598.

⁹ *Sloane v. Shiffer*, 156 Pa. 59, 27 Atl. 67; *Farwell v. Hilton*, 84 Fed. 293. See 12 HARV. L. REV. 65.

insolvent would probably be held responsible to see that it actually reached the trustee. Such a surrender before the filing of the petition, however, would seem to be sufficient to release the preferred creditor from further liability. The present bankruptcy law gives no indication to the contrary, and even allows a preferred creditor who gives the debtor further credit for property which becomes a part of the debtor's estate a set-off to that extent against the amount recoverable by the trustee. BANKRUPTCY ACT OF 1898, § 60 *c*. Moreover, it is unnecessary to show that such new credits remain a part of the debtor's estate at the time of adjudication. *Kaufman v. Tredway*, 195 U. S. 271. On similar principles, *bonâ fide* surrenders to the debtor before the petition is filed should be protected, although as a practical matter a creditor would ordinarily hold his preference until forced to give it up. The result reached in the principal case is also in harmony with the general purpose of the Bankruptcy Act. Although there was a technical preference, still no one creditor would obtain a greater percentage of his debt out of the estate than any other. See *Gans v. Ellison*, 114 Fed. 734, 737.

BANKRUPTCY — PROCEDURE AND PRACTICE — DISMISSAL OF VOLUNTARY PROCEEDINGS BY CONSENT AFTER ADJUDICATION. — After being adjudicated a bankrupt on a voluntary petition, the debtor, with the consent of all his creditors, moved that the proceedings be dismissed. *Held*, that the motion be refused. *Matter of McKee*, 214 Fed. 885, 32 Am. B. R. 731 (Dist. Ct., N. D., Tex.).

Section 18 *g* of the present bankruptcy act provides that upon the filing of a voluntary petition, the judge shall either "make the adjudication or dismiss the petition." This provision, however, becomes inoperative after the adjudication, which is the final decree on the petition. See *In re Hecox*, 164 Fed. 823, 825. The adjudication itself may be set aside by the court on proof of some flaw in jurisdiction. *In re New England Breeder's Club*, 165 Fed. 517. But except for this general power, the statute specifically provides for the re-vesting of title in the bankrupt only upon the confirmation of a composition agreement offered by the bankrupt, accepted by a majority of the creditors, and administered under the direction of the court. BANKRUPTCY ACT OF 1898, §§ 12, 70 *f*. Under practically uniform provisions in the act of 1867, it was held that an application for dismissal after adjudication came too late, and that a composition agreement was the only proper method. *In re Sherburne*, Fed. Cas., No. 12,758. An amendment subsequently provided expressly for the bankrupt's regaining both the title and control of his property in the manner desired in the principal case. BANKRUPTCY ACT OF 1874, § 14. As a matter of history, however, the frauds practiced by bankrupts in collusion with powerful creditors under cover of this section led to the repeal of the entire statute. The omission of the provision from the present act seems significant, and proper statutory construction therefore requires the same result that was reached under the former statute, before the amendment.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — EFFECT OF 1910 AMENDMENT IN STATES WHERE DOWER IS CHATTEL FOR PAYMENT OF HUSBAND'S DEBTS. — By the local law of Pennsylvania the right of dower was made a chattel for payment of the husband's debts. The referee in bankruptcy now certifies to the court the question whether a trustee in bankruptcy can sell the bankrupt's realty free from the wife's right of dower. *Held*, that he cannot. *Matter of Chotiner*, 216 Fed. 916, 32 Am. B. R. 760 (Dist. Ct., W. D., Pa.).

Under the Pennsylvania law, judgment creditors of the husband could reach the wife's dower right by levying execution upon the land. *Directors of the Poor v. Royer*, 43 Pa. 146. Formerly it was held that this right did not pass to the trustee in bankruptcy. *In re Schaeffer*, 105 Fed. 352, 5 Am. B. R. 248; *Porter v. Lazeur*, 109 U. S. 84. The 1910 amendment to § 47 *a* (2),

however, provides that as to property in the custody of the court, the trustee shall be vested with "the rights, remedies, and powers of a credit or holding a lien by legal or equitable proceedings thereon." It would seem to follow that the trustee acquired an execution creditor's lien on the land of the bankrupt and could enforce it, in accordance with the local law, to the exclusion of the wife's right of dower. *In re Codori*, 207 Fed. 784, 30 Am. B. R. 453. The primary aim of this amendment was to prefer the trustee to the vendor in an unrecorded conditional sale. See 28 HARV. L. REV. 204. The principal case, however, seems to fall equally within its purpose, for in both situations a third person has rights to property in the possession of the bankrupt which the latter's creditors can defeat by appropriate proceedings. If the decision is to be supported, therefore, it must be on the narrow ground that technical requirements of the Pennsylvania statute, with reference to inquisition by the sheriff and the like, were not satisfied, and could not be waived by the trustee. PENNSYLVANIA, P. L. 1836, 769, §§ 48 ff.

BANKS AND BANKING — DEPOSITS — RIGHTS OF DEPOSITORS: EFFECT OF FAILURE TO NOTIFY BANK OF A FORGED INDORSEMENT. — A depositor discovered that the bank had charged to his account a check paid by it on a forged indorsement, but failed to notify the bank within a reasonable time. The bank proved no prejudice from his failure to notify promptly. The depositor now seeks to recover the amount of the check from the bank. *Held*, that he cannot recover. *Connors v. Old Forge Discount & Deposit Bank*, 91 Atl. 210 (Pa.).

An unauthorized payment by a bank cannot, in general, be charged to the depositor's account. *Welsh v. German American Bank*, 73 N. Y. 424. But the depositor owes a duty to the bank, arising from the relation, to examine returned vouchers and report forgeries as soon as discovered. *First National Bank v. Allen*, 100 Ala. 476, 14 So. 335; *Dana v. First National Bank of the Republic*, 132 Mass. 156. See EWART, ESTOPPEL, p. 41. Silence in the face of such a duty to speak will form the basis for an estoppel. See *Freeman v. Cooke*, 2 Ex. 654, 663. But estoppel is equitable in its nature and actual damage to the bank should be required to estop the depositor. *Pratt v. Union National Bank*, 79 N. J. L. 117, 75 Atl. 313; *Wind v. Fifth National Bank*, 39 Mo. App. 72. See EWART, ESTOPPEL, p. 133. The principal case, however, is not alone in holding that this estoppel will be available without affirmative proof of prejudice to the bank. *Merchants' Bank v. Lucas*, 13 Ont. R. 520; *Findley v. Corn Exchange National Bank*, 166 Ill. App. 57; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891. Even without the elements of a complete estoppel, the principal case may perhaps be supported on the ground that a binding account stated between the parties arose from the depositor's assent to the statement of accounts and balance, presumably rendered by the bank shortly before the discovery of the forgery. In view of business usage, this statement amounts to an offer by the bank to the depositor to set off the mutual debts. See *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 106. LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 2 ed., 115. The failure of the depositor to object to the balance after a reasonable time may then be interpreted as an assent to the account stated, because of the duty imposed on the depositor from his relation to the bank to examine the bank book and vouchers, and report errors. *Devaynes v. Noble*, 1 Mer. 529, 535, 610; *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263. See *Sherman v. Sherman*, 2 Vern. 276; *Leather Manufacturers' Bank v. Morgan*, *supra*; PAGET, LAW OF BANKING, 2 ed., 150 *et seq.* This stated account would be conclusive on the depositor in the absence of fraud or mistake, neither of which appeared in the principal case, for the depositor had full knowledge of the forgery at the time his assent is to be inferred. *Austin v. Ricker*, 61 N. H. 97; *cf. Leather Manufacturers' Bank v. Morgan*, *supra*.

CARRIERS: PASSENGERS — WHO ARE PASSENGERS — GRATUITOUS CARRIAGE BY CUSTOM: EFFECT OF VIOLATION OF STATUTE AGAINST FREE TRANSPORTATION. — The plaintiff's intestate was an employee of a lumber company and was killed by a falling log while riding on the defendant's logging branch railroad, which the defendant held out for the carriage of passengers. There was a custom by which conductors carried lumbermen like the plaintiff's intestate gratuitously, both sides erroneously believing that it was in accordance with a contract with the lumber company. By statute, gratuitous carriage was made a misdemeanor in both carrier and passenger. *Held*, that the plaintiff cannot recover. *Van Auken v. Michigan Central R. Co.*, 148 N. W. 819 (Mich.).

A person who tenders himself as a passenger and is accepted as such by the carrier, thereupon becomes a passenger. *Merrill v. Eastern R. Co.*, 139 Mass. 238, 239. See 19 HARV. L. REV. 250. The mere fact that the carriage is gratuitous does not negative this relation. *Philadelphia R. Co. v. Derby*, 14 How. (U. S.) 468. Nor is it important that the acceptance is by custom only, and contrary to the company's private orders, so long as it is within the apparent authority of the conductor. *Waterbury v. New York Central & H. R. R. Co.*, 17 Fed. 671. Aside from the statute prohibiting gratuitous carriage, therefore, there seems to be no doubt that the relation of passenger and carrier arose in the principal case. In view of the arrangement believed to exist between the railroad and the lumber company, this statute carried no effective notice of a limitation on the conductor's authority. Nor did it deprive the passenger of the protection to which he was entitled by the law of public service. *Southern Pacific Ry. Co. v. Schuyler*, 227 U. S. 601. It is well settled that the carriers cannot defeat recovery on the ground that the passenger was riding in violation of the law. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126. And it would seem to follow that the railroad is not in a more advantageous position when both parties have violated a statute fixing a punishment of its own, without reference to the civil rights of the passenger. *Southern Pacific Ry. Co. v. Schuyler*, *supra*.

CONSTITUTIONAL LAW — PRIVILEGES, IMMUNITIES, AND CLASS LEGISLATION — RIGHT OF STATE TO EXPEL FOREIGN CORPORATION FOR EXERCISE OF CONSTITUTIONAL PRIVILEGE. — Plaintiff, a foreign corporation, took out a license to do local business in Wisconsin, and acting thereunder acquired valuable property within the jurisdiction. Subsequently it was enacted that the local license of a foreign corporation should be revoked if it removed any suit against a citizen of the state from the state to the federal courts. The act also provided for annual reports in which the corporation should agree to obey the laws of the state. Having removed a cause against a citizen of Wisconsin from a state to a federal court, the secretary of state threatened to revoke its local license. *Held*, that the statute is unconstitutional and the revocation will be enjoined. *Western Union Telegraph Co. v. Frear*, 216 Fed. 199 (Dist. Ct., W. D., Wis.).

An Arkansas statute provided for the licensing of foreign corporations to do business within the state, but provided that the license should be revoked if the corporation should invoke the jurisdiction of the federal courts in a cause against a citizen of Arkansas. A foreign corporation procured such a license, and acting thereunder acquired valuable mining property within the jurisdiction. Upon the corporation's removing a cause to the federal court, the secretary of state cancelled its license. *Held*, that the act is constitutional and that mandamus will not lie to compel the revocation of the cancellation. *State, ex rel. Kimberlite Mining & Washing Co. v. Hodges*, 169 S. W. 942 (Ark.).

For a discussion of the extent of a state's right to use its power over foreign corporations to impair indirectly the jurisdiction of the federal courts, see NOTES, p. 305.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO THE CONTRACT — SOLE BENEFICIARY: EFFECT OF RESCISSION BY CONTRACTING PARTIES. — The defendant, as part consideration for land deeded to him by his father, promised him to pay the plaintiff, the defendant's niece, a sum of money when she reached the age of eighteen. Before the plaintiff had any notice of the contract, it was rescinded by the contracting parties. She now sues for the money. *Held*, that she can recover. *Wetutzke v. Wetutzke*, 148 N. W. 1088 (Wis.).

This decision is entirely in accord with principle. A contract for the sole benefit of a third party should vest an irrevocable right in him immediately. His consent, as in the case of a gift of property, should be presumed from the beneficial nature of the transaction. If, however, the contract is one to discharge a debt owed by the promisee, the creditor should have no right to object to rescission by the parties unless, the debtor being insolvent, this amounts to a fraudulent disposition of a valuable asset. See WILLISTON'S *WALD'S POLLOCK, CONTRACTS*, pp. 273, 274. A few jurisdictions recognize this distinction. *Thompson v. Gordon*, 3 Strobb. (S. C.) 196; *Youngs v. Trustees*, 31 N. J. Eq. 290; *Willard v. Worsham*, 76 Va. 392. But the majority of cases say in general terms that the contracting parties may rescind a contract for the benefit of a third person at any time before the latter consents. *Gilbert v. Sanderson*, 56 Ia. 349, 9 N. W. 293; *Trimble v. Strother*, 25 Oh. St. 378; *Spaulding v. Henshaw*, 80 Ky. 55; *Blake v. Atlantic National Bank*, 33 R. I. 464, 82 Atl. 225; *Carnahan v. Tousey*, 93 Ind. 561. In at least one of these jurisdictions, however, the result of the principal case might be reached on the ground that the consent of an infant sole beneficiary would be presumed. See *Richards v. Reeves*, 149 Ind. 437, 49 N. E. 348. The jurisdiction of the principal case, on the other hand, appears to forbid rescission in all cases. See *Zwietusch v. Becker*, 153 Wis. 213, 140 N. W. 1056. Codes or statutes in several states provide that contracts for the benefit of a third party may be sued on by the third party at any time before the contracting parties rescind. CIV. CODE CAL., § 1559; REV. L. OKLA. 1910, § 895; CIV. CODE SO. DAK., § 1193. Foreign codes, also, generally require notice of assent by the third party to prevent revocation. See 16 HARV. L. REV. 43 ff.

CRIMINAL LAW — ATTEMPT — ACCEPTANCE OF BRIBE BY PUBLIC OFFICIAL FOR PURPOSES OF DETECTION. — The defendant offered the state's attorney a bribe if he would drop certain criminal proceedings. The state's attorney, in order to trap the defendant, accepted the money. The Illinois Criminal Code, HURD'S REV. STAT. 1913, c. 38, § 31, provides that whoever corruptly gives money to a state's attorney with intent to influence him in his official capacity is guilty of bribery, and punishable by imprisonment. Section 32 imposes a fine for an "offer or attempt to bribe" a state's attorney. *Held*, that the defendant is not guilty of bribery, and can be convicted only for an attempt. *People v. Peters*, 106 N. E. 513 (Ill.).

At common law the distinction between bribery and an attempt to bribe was largely academic; both were misdemeanors, and equally punishable. *Walsh v. People*, 65 Ill. 58; 2 BISHOP, CRIMINAL LAW, 8 ed., § 88. Hence the subject is much confused in the books. A corrupt offer of money, though rejected, was sometimes treated as the substantive offense. See 1 HAWK. P. C., 6 ed., 32; COKE, 3 INST., 147, § 3; MAY, CRIMINAL LAW, 2 ed., § 140. Lord Mansfield, however, considered it a mere attempt. See *Rex v. Vaughan*, 4 Burr. 2494, 2500. And it is classed as such in the Illinois statute. But a delivery of money on corrupt terms, to one who professes to accept the terms, would seem to constitute the complete crime. *Henslow v. Fawcett*, 3 A. & E. 51. But see *Newman v. People*, 23 Col. 300, 305, 47 Pac. 278, 280. The bribe-giver's wrongful act consists in corruptly exerting pressure on a public official, and this

is accomplished when the bribe money is delivered, if not before. See *Sulston v. Norton*, 3 Burr. 1235, 1237. The court's contention that, as the state's attorney was not bribed, the defendant could not have bribed him, is a play on words. Bribe-giving and bribe-taking are separate and independent crimes, though called by the same name. See *State v. Dudoussat*, 47 La. Ann. 977, 997, 17 So. 685, 687. That the state's attorney participated in the crime for purposes of detection is of course no defense. *People v. Mills*, 178 N. Y. 274, 70 N. E. 736; *Minter v. State*, 159 S. W. 286 (Tex.). Had he instigated the crime, some jurisdictions would have excused the wrongdoer. *O'Brien v. State*, 6 Tex. App. 665. *Contra, Grimm v. United States*, 156 U. S. 604. See 18 HARV. L. REV. 65. But mere participation is a defense only where it negatives an essential element of the crime. *Rex v. Martin*, R. & R. 196.

CRIMINAL LAW — SENTENCE — EFFECT OF COMMUTATION. — A convict had served over twenty years of a life term when the state board of pardons commuted the sentence to imprisonment for thirty years. Had this been the sentence at the outset, the convict would already have been entitled to release by reason of good behaviour. *Held*, that the convict must be discharged. *State ex rel. Murphy v. Wolfer*, 148 N. W. 896 (Minn.).

The court proceeded upon the theory that commutation substitutes one sentence for another. See *Lee v. Murphy*, 22 Gratt. (Va.) 789, 799; *Johnson v. State*, 63 So. 163 (Ala.). Accordingly, it reasoned that after commutation the status of the prisoner was necessarily the same as though the original term had been but thirty years, and so held him entitled to deductions for prior good behavior, under the statute granting this allowance to all but life convicts. MINN. GEN. STAT., 1913, § 9309. With due respect, however, it is submitted that no rigid legal rule requires that commutation invariably operate as if the lesser sentence had been first imposed. On the contrary, the intent of the pardoning power should be controlling. Thus it has been held that commutation to "nine years actual time" precluded any deduction for good behavior. See *In re Hall*, 34 Neb. 206, 51 N. W. 750. Moreover, the circumstance that if prior good time were allowed, the prisoner could claim his discharge twenty-three days after commutation, has been taken to indicate that previous good behavior was not to be considered. *In re McMahon*, 125 N. C. 38, 34 S. E. 193. This authority the principal case seeks to distinguish on the purely formal ground that the Minnesota statute states expressly that "good time" should begin on arrival in prison. But it would seem that in the present case there was all the more reason for excluding allowances for prior good behavior from the "thirty years" when the opposite construction made discharge in fact overdue at the time of commutation. A result like that of the principal case should be attained where, and only where, the commuting authority intends a complete substitution of the new sentence with its concomitant legal consequences.

DEAD BODIES — NEGLIGENT MUTILATION — RIGHT OF RECOVERY FOR MENTAL ANGUISH BY RELATIVE OTHER THAN NEXT OF KIN. — The mother of a boy killed on the defendant railroad sued the company for mental anguish caused by the negligent mutilation of the dead body. The father, who was living, was by statute the next of kin. *Held*, that the mother cannot recover. *Floyd v. Atlantic Coast Line Ry. Co.*, 83 S. E. 12 (N. C.).

In England the law recognizes no property right in a corpse. *Williams v. Williams*, 20 Ch. D. 659. In this country a dead body is not property in the absolute sense of the word. But the great weight of authority holds that a legal "quasi-property" right to the possession of the dead body for the purpose of burial vests first in the surviving wife or husband, and then in the next of kin. Any wilful or wanton mutilation of the body will be a violation

of this right, and will furnish ground for recovery for consequent mental anguish. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238; *Kyles v. Southern Ry. Co.*, 147 N. C. 394, 61 S. E. 278. But see *Long v. Chicago, R. I. & P. Ry. Co.*, 15 Okla. 512, 86 Pac. 289. There is also authority for such recovery where the injury is merely negligent. *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605. Cf. *Birmingham T. & T. Co. v. Still*, 61 So. 611 (Ala.). *Contra*, *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151. The limited character of the right, however, is shown by the fact that it may be defeated by the deceased's contract. *Painter v. U. S. Fidelity & Guaranty Co.*, 91 Atl. 158 (Md.). Even in the absence of such a limitation, however, the principal case properly denies recovery, for the legal right is vested in the next of kin, and he alone may sue for the mental anguish caused by any mutilation.

EASEMENTS — MODES OF ACQUISITION: IMPLIED GRANT — RIGHT TO WATER PUMPED BY GASOLINE ENGINE ON ADJOINING LAND. — The defendant owned a tract of land, one part of which was supplied with water from a well on another part, which was pumped by a gasoline engine there situated. The *quasi*-dominant tenement was first leased to the plaintiff, and then sold to a third party, who later conveyed to the plaintiff. Neither deed mentioned the water rights, but the pipes were visible and the use of the system necessary to the full enjoyment of the land. The defendant then cut off the water, shut up the pump-house and blocked up the way thereto. The plaintiff now seeks to enjoin him from further interference with her rights. *Held*, that she is entitled to the relief sought. *Adams v. Gordon*, 106 N. E. 517 (Ill.).

In order to imply the grant of an easement, it must be apparent, continuous, and reasonably necessary to the enjoyment of the premises conveyed. *Spencer v. Kilmer*, 151 N. Y. 390, 45 N. E. 865. The word "continuous," has been the subject of much dispute. Some have thought that it required the easement to be capable of enjoyment without the intervention of man, as, for example, a drain or light and air. See GALE, EASEMENTS, 3 ed., p. 83. On this theory, the implied grant of a right of way has been held impossible. *Bonelli Bros. v. Blakemore*, 66 Miss. 136. But the view now generally adopted is that the easement is continuous if the tenements are permanently adapted to its enjoyment. *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094; *Baker v. Rice*, 56 Oh. St. 463, 47 N. E. 653. See GALE, EASEMENTS, 8 ed., p. 137. Under this view the grant of an easement to water pumped by an hydraulic ram has been implied. *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182. The doctrine of implied easements, however, should be confined to narrow limits, for it does not depend on any intention of the parties, and is also hostile to the policy of the registry system. See 1 TIFFANY, REAL PROPERTY, p. 710. The principal case extends the rule farther than any previous decision, and is therefore to be regretted. But see *Foote v. Yarlott*, 238 Ill. 54, 87 N. E. 62; *Eliason v. Grove*, 85 Md. 215.

EMINENT DOMAIN — COMPENSATION — VALIDITY OF STATUTE EXTINGUISHING RIGHT TO COMPENSATION WITHOUT NOTICE. — A statute provided that all private owners of easements in any street which a city intended to close must present their claims for compensation within six years after the filing of the map by the city. The city filed such a map in 1895 to close two streets, in which private owners had easements. In 1898 the streets were closed. In 1906 the city condemned the fee in the streets for another purpose, and the owners' right to substantial compensation depended on the question whether the easements had been extinguished. *Held*, that the easements still exist, on the ground that the statute is unconstitutional. *In the Matter of the City of New York*, 212 N. Y. 538.

An abutter's private easement in a street cannot be extinguished without compensation. *Schneider v. City of Detroit*, 72 Mich. 240, 40 N. W. 329. Any

statute authorizing the taking of such a protected property right must therefore provide reasonable means for compensation, prior or subsequent. *State v. City of Perth Amboy*, 52 N. J. L. 132, 18 Atl. 670; *Tuttle v. Justices of Knox County*, 89 Tenn. 157, 14 S. W. 486. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 813. It is also essential, except in three or four jurisdictions, that some sort of notice be given to the property owner before or after condemnation. See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 564. Even where a statute does not specifically provide for notice, its constitutionality is usually upheld by implying a requirement for notice. See *Peoria & R. I. Ry. Co. v. Warner*, 61 Ill. 52. It seems better, however, to avoid such judicial legislation and hold void a statute which makes no provision for reasonable notice. *Savannah, F. & W. Ry. Co. v. Mayor*, 96 Ga. 680, 23 S. E. 847; *Board of Education v. Aldredge*, 13 Okla. 205, 73 Pac. 1104. In the principal case, the filing of a map to close the street was the only notice prescribed by the statute. The filing of a notice of appropriation in the registry of deeds has been held sufficient constructive notice in another jurisdiction to bar all right to compensation after three years. *Appleton v. City of Newton*, 178 Mass. 276, 56 N. E. 648. But (unless it can be said that the abandonment of the street by the city would itself carry the necessary notice) the doctrine of the principal case seems preferable, and the decision must be supported. It is settled, however, that if the landowner is protected by adequate notice, the mere fact that the statute throws upon the landowner the duty to seek compensation within a fixed time will not render it unconstitutional. *Banse v. Town of Clark*, 69 Minn. 53, 71 N. W. 819; *Barker v. Southern Ry. Co.*, 137 N. C. 214, 49 S. E. 115.

EVIDENCE — CHARACTER OF PARTIES — CRIMINAL PROSECUTION FOR ADULTERY: CHARACTER OF THE ALLEGED PARTICIPANT. — At the trial of an indictment for adultery, the defendant offered evidence of the good character of the woman with whom he was charged to have committed the offense. The evidence was excluded. *Held*, that the evidence should have been admitted. *Glover v. State*, 82 S. E. 602 (Ga. App.).

According to the general rule applicable in civil cases, the character of the defendant is not admissible on the issue of his adultery in an action for divorce. *Humphrey v. Humphrey*, 7 Conn. 116. But see 13 HARV. L. REV. 607. The defendant's character is equally inadmissible in criminal prosecutions for adultery, unless he takes advantage of the established exception allowing the criminal defendant to offer evidence of his own good character. *State v. Snyder*, 86 Vt. 449, 85 Atl. 984. But when the character of a third party is offered, the character rule applies with much diminished force, and the tendency is to treat the evidence like other collateral matter. See 1 WIGMORE, EVIDENCE, § 68. When adultery is in issue, therefore, since the proof must necessarily be largely circumstantial, and the character of the participant is usually quite relevant, the considerations favoring admissibility generally prevail. Thus, in a criminal action like that in the principal case, the good character of the alleged participant may be shown by the defendant to refute the charge. *Commonwealth v. Gray*, 129 Mass. 474. On the same principle, the prosecution may show the bad character of the participant. *State v. Eggleston*, 45 Ore. 346, 77 Pac. 738; *Sutton v. State*, 124 Ga. 815, 53 S. E. 381; *State v. Nieburg*, 86 Vt. 392, 85 Atl. 769. *Contra*, *Guinn v. State*, 65 S. W. 376 (Tex. Crim. App.). Similar rules govern evidence of this kind in civil suits for divorce on the ground of adultery. *Marble v. Marble*, 36 Mich. 386; *Clement v. Kimball*, 98 Mass. 535.

EVIDENCE — DECLARATIONS CONCERNING MENTAL STATE — DECLARATIONS OF PRESENT INTENTION AS PROOF OF EXISTING FACT. — In a suit by

one alleged to be an illegitimate posthumous child of a deceased workman to recover compensation for the death of the alleged father as a dependent under the English Workmen's Compensation Act, declarations by the deceased to the mother and to others, admitting that he was the father of the child and declaring his intention to marry the mother, were offered in evidence to prove paternity and dependency. *Held*, that the declarations are admissible. *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.*, [1914] A. C. 733.

For a discussion of the results to which this decision seems to lead, see this issue of the REVIEW, p. 299.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS AND DUTIES — RIGHT OF RETAINER: PRESENT SCOPE OF THE DOCTRINE. — A and B, joint trustees, lost part of the trust funds by an improper investment. A died, appointing B and C his executors. C took A's place as joint trustee, and now claims the right to retain from A's estate the sum due the trust. *Held*, that he may retain. *In re Harris*, [1914] 2 Ch. 395.

A became bound to pay a certain sum to trustees, in trust for herself for life, and then for B, her daughter. She died thirty years after the obligation arose, without having paid the debt, and appointed B her executrix. B now claims the right to retain the sum due from A's estate. *Held*, that she may not retain for a debt due her as *cestui que trust*. *In re Sutherland*, 49 L. J. 490 (Chan. Div.).

In England an executor may retain from the estate the amount of a debt due to him. This right arose from the common-law rule allowing preferences to creditors of the estate and the consequent injustice if the executor were placed in a worse position than other creditors, through his inability to sue himself. *Woodward v. Lord Darcy*, Plowd. 184; *Crowder v. Stewart*, 16 Ch. D. 368. When the debt is due to another in trust for the executor, the trustee can bring suit and with the abolition of the executor's common-law right to prefer creditors, the necessity for retainer ceases. The second principal case seems correct. See, therefore, *Cockcroft v. Black*, 2 P. Wms. 298. Cf. *Thompson v. Thompson*, 9 Price, 469. It does not seem material that the claim arose after the testator's death. *In re Barrett*, 43 Ch. D. 70. In England, moreover, the executor may retain even if the claim was barred by the Statute of Limitations in the lifetime of the testator. *Stahlschmidt v. Lett*, 1 Sm. & G. 415. In America, the right of retainer exists in a few states, but has been generally abolished, or limited to solvent estates. See *Nelson v. Russell's Adm'rs*, 15 Mo. 356; *Miller v. Irby*, 63 Ala. 477. In states where the right still exists, the English rules are generally followed, except that, by the weight of American authority, an executor may not retain for a debt barred by the Statute of Limitations. *Hoch's Appeal*, 21 Pa. 280; *Rogers v. Rogers*, 3 Wend. (N. Y.) 505. If a legatee may plead the statute against a creditor when the executor does not, he should have the same right against the executor himself, and this feature of the American doctrine therefore seems preferable. See 22 HARV. L. REV. 452.

GIFTS — GIFTS *Mortis Causa* — GIFT OF DONOR'S OWN CHECK. — The testator drew a check for an amount greater than the amount of his deposit, and delivered it to the plaintiff as a gift *mortis causa*. The plaintiff now sues the executor, who had withdrawn the funds from the bank. *Held*, that the plaintiff may recover the amount of the deposit. *Aubrey v. O'Byrne*, 49 Nat. Corp. Rep. 302 (Ill. App. Ct., Oct. 8, 1914).

The negotiable instrument of a third party may be the subject of a valid gift *mortis causa*. *Clement v. Cheesman*, 27 Ch. D. 631; *Brown v. Brown*, 18 Conn. 410. Delivery of the instrument would carry with it an irrevocable power of attorney to enforce the obligation in the name of the donor. *Snell-*

grove v. Baily, 3 Atk. 213; *Chase v. Redding*, 79 Mass. 418. The donor's own check, however, stands upon a different footing. An ordinary bank account is a mere parol *chose in action*. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252. Such a claim may be irrevocably assigned by deed under seal. *Matson v. Abbey*, 141 N. Y. 179, 36 N. E. 11. But a parol assignment without consideration is generally held revoked by the death of the donor. *Cook v. Lum*, 55 N. J. L. 373, 26 Atl. 803. With a few exceptions, among them Illinois, the authorities also agree that a check is not an assignment, but a mere authority to the bank to make payment. *Hopkinson v. Foster*, L. R. 19 Eq. 74; *O'Connor v. Mechanics Bank*, 124 N. Y. 324, 26 N. E. 816. *Contra*, *Niblack v. Park National Bank*, 169 Ill. 517, 48 N. E. 438. And the Uniform Negotiable Instruments Law, § 189, adopted in Illinois, expressly so provides. Where, however, a check covers the whole deposit, or is accompanied by an assignment agreement, it may operate as an assignment. *In re Taylor's Estate*, 154 Pa. 183, 25 Atl. 1061. *Cf. Matter of Smither*, 30 Hun (N. Y.) 632. See 27 HARV. L. REV. 177. This is still possible, even under the Negotiable Instruments Law. See *Hove v. Stanhope State Bank*, 138 Ia. 39, 115 N. W. 476. The principal case, accordingly, may conceivably be justified on the ground that the check operated as an assignment of the deposit by mercantile specialty, not revoked by the death of the donor. But if this line of reasoning fails at any point, recovery is impossible, for the donee's suit against the donor's personal representative on the instrument will be met by the plea of lack of consideration. *Harris v. Clark*, 3 N. Y. 93.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — CONTRACTS BY RAILROAD AS TO LOCATION OF DEPOTS. — A contract provided that the plaintiff railroad should notify the defendant of the places selected by the railroad's chief engineer as locations for its depots, and that the defendant should then purchase and lay out town sites at such places, sell the lots, and divide the proceeds with the plaintiff. *Held*, that the contract is void as against public policy. *Minnesota, D. & P. Ry. Co. v. Way*, 148 N. W. 858 (S. D.).

Any contract made by a railroad which may interfere with the performance of its public obligations is void as against public policy. *Pueblo & A. V. R. Co. v. Taylor*, 6 Colo. 1. An agreement not to locate a depot at a particular place is clearly within this rule. *Williamson v. Chicago, R. I. & P. R. Co.*, 53 Ia. 126, 4 N. W. 870. The validity of a contract to locate a depot at a particular place, without restrictions as to stations elsewhere, is, however, in dispute. *Atlanta & W. P. R. Co. v. Camp*, 130 Ga. 1, 60 S. E. 177; *Cf. Pacific R. Co. v. Seely*, 45 Mo. 212. See 2 ELLIOTT, RAILROADS, 2d § 928. But such agreements would also seem to be improper, in view of the danger that the efficiency of the railroad may be impaired by the unnecessary burdens consequent on the maintenance of such depots. *Halladay v. Patterson*, 5 Ore. 177. See *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Bestor v. Walthen*, 60 Ill. 138. The contract in the principal case evidently aimed to avoid all objections by leaving the selection of the depots entirely to the railroad. It is true, of course, that this power belongs primarily to the railroad. *Florida Central & P. R. Co. v. State*, 31 Fla. 482, 13 So. 103. Its exercise, however, must not be influenced by any interest prejudicial to the public. *Pacific R. Co. v. Seely*, *supra*. In the principal case, the varying values of real estate in different localities might well appeal to the railroad in its choice of locations, and the decision properly refuses to allow it to be subjected to this temptation. See *St. Joseph & Denver City R. Co. v. Ryan*, 11 Kan. 602, 609.

INDICTMENT AND INFORMATION — FINDING AND FILING INDICTMENT — VALIDITY OF INDICTMENT BASED ON HEARSAY TESTIMONY — EFFECT OF

PRESENCE OF STENOGRAPHER IN GRAND JURY ROOM. — The defendants were indicted for conspiracy to conceal assets in bankruptcy. Among the witnesses heard by the grand jury was a detective employed by the Department of Justice much of whose testimony was hearsay. A stenographer, duly appointed and sworn, was present in the grand jury room. *Held* that either circumstance is ground for quashing the indictment. *United States v. Rubin*, 52 N. Y. L. J. 473 (U. S. Dist. Ct., Conn.).

This case adds new confusion to an already irreconcilable clash of opinion in the federal courts. One federal court has announced that under no circumstances will evidence before the grand jury be subject to judicial control. See *In re Kittle*, 180 Fed. 946, 947 (S. D., N. Y.). According to another view, the court will not ordinarily review the evidence before the grand jury, but may quash the indictment in extreme cases, as where it appears on the face of the indictment that the only witness heard was incompetent. See *United States v. Terry*, 39 Fed. 355, 356 (N. D., Cal.). A more prevalent view is that the court may inquire into the evidence, but will quash the indictment only if there was no legal evidence, or if the evidence mainly relied on was incompetent. *United States v. Farrington*, 5 Fed. 343 (N. D., N. Y.); *United States v. Kilpatrick*, 16 Fed. 765 (N. C.); *United States v. Jones*, 60 Fed. 973 (Nev.). See *McGregor v. United States*, 134 Fed. 187, 192 (C. C. A. 4th Circ.). The principal case goes still further, for it was not even shown that the testimony harmed the defendant. This conflict, however, seems likely to remain unsettled, for in the federal courts a refusal to quash an indictment will seldom be reviewed on appeal. *McGregor v. United States*, *supra*; *Holt v. United States*, 218 U. S. 245. As to the stenographer, the case is opposed to previous federal *dicta* and decisions, and overrides a long established practice in the federal courts. *United States v. Simmons*, 46 Fed. 65. See *United States v. Heinze*, 177 Fed. 770, 772. The court's view that the Act of 1906, c. 3935 (34 STAT. AT L. 816) excludes stenographers from the grand jury room seems untenable. Its purpose was to permit special appointees of the Attorney-General to conduct grand jury proceedings, not to exclude persons previously admitted. See *United States v. Heinze*, *supra*, 773. On both grounds of decision the principal case seems to take an unnecessarily narrow view, and as to the stenographer, at least, another federal court has since reached a different conclusion. *United States v. Rockefeller*, (U. S. Dist. Ct. S. D., N. Y., not yet officially reported).

INJUNCTIONS — ACTS RESTRAINED — ELECTION OF DELEGATES TO ALLEGED UNAUTHORIZED CONSTITUTIONAL CONVENTION. — A special election had been held in New York to submit to the voters the question of calling a state constitutional convention. The result was certified to be in favor of holding the convention. The plaintiff, a taxpayer, seeks to enjoin the state election officials from proceeding with the election of delegates to this convention on the ground that the ballots were not properly counted at the election and that the statute in compliance with which it was held is unconstitutional. *Held*, that the injunction will not be granted. *Schieffelin v. Komfort*, 212 N. Y. 520.

For a discussion of this case, see this issue of the REVIEW, p. 309.

INSURANCE — RE-INSURANCE — MEASURE OF LIABILITY OF RE-INSURER WHEN INSURER BANKRUPT. — A guarantee society guaranteed the debentures of a trading company and re-insured part of the risk. The trading company failed, and the guarantee society was unable to meet the claims of the trading company's debenture holders. *Held*, that the reinsurer is liable for the full amount of the claims re-insured, rather than for the ratable sum which the insolvent guarantee society is able to pay.

In re Law Guarantee Trust and Accident Society, Ltd., [1914] W. N. 291 (Eng. C. A.).

For a discussion of the principles underlying the liability of a re-insurer in this and similar cases, see NOTES, p. 302.

INTERSTATE COMMERCE — CONTROL BY STATES — RAILROAD REGULATION — REGULATIONS BY STATE COMMISSION AS TO DEMURRAGE. — The Michigan Railroad Commission passed certain demurrage rules applicable to all traffic originating or terminating within the state. In respect to the time allowance for loading and unloading, these rules differed materially from those tentatively indorsed by the Interstate Commerce Commission. The plaintiff asks for an injunction restraining the enforcement of the state commission's rules. *Held*, that the injunction will be granted as to interstate shipments, and denied as to intrastate shipments. *Michigan Central R. Co. v. Michigan Railroad Commission*, 148 N. W. 800 (Mich.).

The court distinguishes the Shreveport Rate Cases on the ground that there the Interstate Commerce Commission had made a finding that the regulation as to intrastate commerce was an unreasonable interference with commerce between the states. This distinction seems valid. The federal power to regulate intrastate commerce arises solely as an incident to the power to control interstate commerce. Until the protection of the latter necessitates federal interference, the control of the states over the former should be absolute. See *The Shreveport Rate Cases*, 234 U. S. 342; for discussion, see 28 HARV. L. REV. 34, 113. For a criticism of a decision contrary to the principal case, see 27 HARV. L. REV. 388.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — BREACH OF CONDITION: WAIVER OF BREACH BY APPLICATION TO COMPEL LESSEE'S RECEIVER TO ELECT TO ADOPT OR RENOUNCE THE LEASE. — The defendants were appointed receivers of an insolvent lessee, and the plaintiff, the lessor, applied to the court to fix a time within which the receivers should either "adopt or renounce the lease." The receivers thereupon assumed the lease, and the plaintiff now asks for authority to dispossess them, under his right to reënter for default in rent, unless they pay back rent which accrued before the receivership. *Held*, that the petition be denied, on the ground that the plaintiff has waived the breach. *Durand & Co. v. Howard & Co.*, 216 Fed. 585 (C. C. A., 2d Circ.).

A receiver in insolvency, like a trustee in bankruptcy, may adopt a lease owned by the debtor, at his election. See *Carswell v. Farmers' Loan & Trust Co.*, 74 Fed. 88, 91. But he has no power of eminent domain, and must take subject to the landlord's right to declare a forfeiture for defaults by the tenant. *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.*, 58 Fed. 257, 265. In the principal case, therefore, in the absence of a waiver of the breach of condition by the landlord, the receiver was not entitled even in equity to keep possession without payment of all back rent. See *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715, 61 Atl. 157. The majority of the court, however, felt that the landlord's application to the court to compel the receivers to make their election constituted such a waiver. It is true that in order to avoid forfeiture the courts will spell out a waiver from any act by the landlord recognizing the continued existence of the tenancy. *Hasterlik v. Olson*, 218 Ill. 411, 75 N. E. 1002; *Brooks v. Rodgers*, 99 Ala. 433, 12 So. 61. Thus the acceptance of rent accruing after breach, or the institution of legal proceedings based on the relation of landlord and tenant, will conclude the landlord. *Conger v. Duryee*, 90 N. Y. 594; *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Moore v. Ullcoats Mining Co.*, [1908], 1 Ch. 575. Mention of the lease as existing in subsequent negotiations, or in a receipt for prior rent have also been held to

amount to a waiver. *Ward v. Day*, 4 B. & S. 337; *Green's Case*, Cro. Eliz. 3; *Doe v. Miller*, 2 C. & P. 348. To predicate the same consequences, however, on the use of the word "lease" in an application by the landlord, which itself recognizes nothing more than the receiver's right to the term subject to existing conditions, seems to be a considerable extension of the doctrine of waiver.

LANDLORD AND TENANT — REPAIR AND USE OF PREMISES — EXTENT OF LANDLORD'S LIABILITY FOR DANGEROUS PREMISES REMAINING UNDER HIS CONTROL. — The plaintiff, the wife of a tenant, received personal injuries while using a common stairway in the tenement which remained in the control of the landlord, the defendant. The jury found that the landlord was negligent in failing to provide a sufficient railing, but that this condition was known to the plaintiff and defendant alike. *Held*, that the plaintiff cannot recover. *Lucy v. Barnden*, [1914] 2 K. B. 318.

The plaintiff, a child of tender years, whose father was a tenant, was injured by falling through a gap in the railings attached to the area steps of a tenement house. The steps were used by all the tenants in common, and remained in the possession of the landlord. The jury found that the railings were defective at the time of letting, and dangerous to children, but that the defect was not a trap. *Held*, that the plaintiff cannot recover. *Dobson v. Horsley*, 137 L. T. J. 563 (Ct. App.).

In each case the plaintiff was not a party to the lease, and therefore took no advantage from the English statute imposing on the owners of tenement houses a duty to keep the premises in a reasonably safe condition. 9 Edw. VII., c. 44, §§ 14, 15; *Middleton v. Hall*, 108 L. T. R. 804; *Ryall v. Kidwell*, [1914] 3 K. B. 135. Apart from statute, however, the landlord owes a duty to the tenant, his family and guests, to take care to maintain the premises remaining under his control in reasonably safe repair. *Miller v. Hancock*, [1893] 2 Q. B. 177; *Hargroves, Aronson & Co. v. Hartopp*, [1905] 1 K. B. 472; *cf. Ivay v. Hedges*, 9 Q. B. D. 80. This obligation is similar to that owed by an occupier to invited persons. *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311. See SALMOND, TORTS, 3 ed., p. 373. Authorities differ as to whether this duty requires the landlord only to give notice, or to keep the premises reasonably safe. The weight of English opinion undoubtedly regards mere warning against unexpected dangers as sufficient. See *Cavalier v. Pope*, [1906] A. C. 428, 432; *Smith v. London & St. Katharine Docks*, L. R. 3 C. P. 326, 333. Upon this reasoning, the two principal cases are clearly justified. But in certain analogous cases, mere notice of the danger is no defense. *Smith v. Baker*, [1891] A. C. 325. The American authorities, on the other hand, tend to impose a greater duty on the landlord, — to keep the premises in a reasonably safe condition, even though the defect is known. *Lang v. Hill*, 157, Mo. App. 685, 138 S. W. 698; *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124; *Farley v. Byers*, 106 Minn. 260, 118 N. W. 1023. In view of the relation of landlord and tenant, this more liberal doctrine seems preferable. Even in this country, however, the defense of voluntary assumption of risk is open, and some states also deny recovery to the tenant if the defect was known when the tenancy began, and no substantial change has since occurred. *Quinn v. Perham*, 151 Mass. 162, 23 N. E. 735; see *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357.

LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW — RELET-TING OF PREMISES BY LANDLORD. — A lease expressly authorized the lessor to reënter and terminate the lease for default in the payment of rent, but made no provision for reletting on account of the tenant. The lessees had sublet the premises at a loss, and allowed the rent to fall in arrear. The lessor then reëntered, relet to the subtenant at the rent reserved in the sublease, and

notified the lessees that he would hold them for the deficiency. He now sues for this amount. *Held*, that he is entitled to recover. *Slayton v. Jordan*, 42 Wash. L. Rep. 708 (Dist. Col.).

If the lessee did not, in fact, consent to abandon his term, there was undoubtedly a termination by forfeiture. In such a case, the tenant is not liable for future rent. *Ex parte Houghton*, 1 Lowell (U. S.) 554. On the assumption apparently made by the court, however, that there was an abandonment, the great majority of the cases would agree that the estate was not ended, on the ground that there is no surrender when notice is given to the tenant, as in the principal case, of the reletting on his account. *Auer v. Penn*, 99 Pa. 370; *Oldewartel v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969; *Brown v. Cairns*, 107 Ia. 727, 77 N. W. 478. *Contra*, *Gray v. Kaufman, etc. Co.*, 162 N. Y. 388, 56 N. E. 903. *Cf. Haycock v. Johnson*, 97 Minn. 289, 106 N. W. 304. Where it does not appear that notice was given, however, the authorities almost unanimously hold that there is a surrender. *Amory v. Kanhoffsky*, 117 Mass. 351; *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369; *contra*; *Auer v. Hoffman*, 132 Wis. 620, 112 N. W. 1090. On principle it is hard to see why mere notice should be decisive. The contractual theory of mitigation of damages has no application, for the landlord certainly is under no duty to care for the tenant's property in the leasehold, and, on strict theory, he has no right to intermeddle unless authorized. Accordingly, if the landlord relets without the express or implied assent of the tenant, he does an act entirely inconsistent with the continuance of the original lease. *Gray v. Kaufman, etc. Co.*, *supra*. To make such conduct operate as a surrender, however, fails to afford adequate protection to the landlord, and since the reletting will usually be for the best interests of the tenant as well, strong practical considerations justify the attitude generally taken by the authorities. The principal case properly applies this doctrine in spite of the provision for forfeiture in the lease, for that was inserted for the benefit and could therefore be waived by him. *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639.

LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW — VOID ASSIGNMENT OF THE ORIGINAL LEASE. — A tenant under a term for years with his landlord's consent assigned his lease to "the Merrimack Building Company," which entered into possession and paid rent. There was no law under which the associates could have incorporated and under these circumstances the law of the state allowed a collateral attack. The landlord claimed a merger of the term through a surrender by operation of law. *Held*, that the term still remained in the original tenant, but that an equitable interest passed to the associates of the company, and decreed that title be quieted in the latter. *Johnson v. Northern Trust Co.*, 106 N. E. 814 (Sup. Ct., Ill.).

For a discussion of the place of intent of the parties in the law of surrenders by operation of law, see NOTES, p. 313.

PARENT AND CHILD — PARENTS' LIABILITY FOR TORT OF CHILD — KNOWLEDGE OF PREVIOUS COMMISSION OF SIMILAR DANGEROUS ACT. — The defendant's minor son kicked the plaintiff, another infant, and injured him. It was alleged that the same boy had kicked the plaintiff on a previous occasion, and there was evidence that his father had notice of this fact. At the trial the jury found for the plaintiff. *Held*, that the defendant was not liable whether he had notice or not. *Corby v. Foster*, 29 Ont. L. R. 83 (Sup. Ct. Ont., App. Div.).

Under the civil law a parent is liable for the tort of his minor child. *MERRICK*, CIVIL CODE, LOUISIANA, § 2318; *Marionneaux v. Brugier*, 35 La. Ann. 13. But at common law the general rule is that the mere relation imposes no such liability upon the parent. *Bassett v. Riley*, 131 Mo. App. 676, 111 S. W.

596. The infants, if of a responsible age, are themselves liable for their own torts. See *Paul v. Hummel*, 43 Mo. 119; 14 HARV. L. REV. 71. Irrespective of the parental relationship, of course, the father may be liable on the principles of agency. *Teagarden v. McLaughlin*, 86 Ind. 476. See 28 HARV. L. REV. 91. Furthermore, if he stands by and does not restrain the child from doing the act, he is deemed to have authorized or consented to it and is liable. *Beedy v. Reding*, 16 Me. 362; *Hoverson v. Noker*, 60 Wis. 511. An action also lies if the father's own negligence was a proximate cause of the child's doing the injury, as where he gives the child a gun. *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013; *Thibodeau v. Cheff*, 24 Ont. L. R. 214; *Johnson v. Glidden*, 11 S. D. 237. But even where the child is an imbecile there is no liability in the absence of negligence. *Bollinger v. Rader*, 153 N. C. 488, 69 S. E. 497. Similarly, mere notice of the vicious disposition of a child will not render the parent liable for its assaults. *Paul v. Hummel*, *supra*. See *Baker v. Haldeman*, 24 Mo. 219. It is submitted, therefore, that the principal case is correct in basing the liability on negligence, and in refuting the contention that by analogy to animals the parent was liable by reason of *scienter*.

PARTNERSHIP — RETIREMENT OF PARTNERS — LIABILITY OF NOMINAL PARTNER FOR INJURY TO INVITED PERSON. — A business formerly operated by father and son was continued after the father's retirement, and with his consent, under the old firm name of "E. Dieudonne & Son." The plaintiff, who had been a customer prior to the retirement and knew nothing of it, came to the firm's shop on business and was injured by the negligence of an employee. *Held*, that the retired partner is liable. *Jewison v. Dieudonne*, 149 N. W. 20 (Minn.).

A person who holds himself out as a partner may be responsible, under some circumstances, to those dealing with the firm. *Stearns v. Haven*, 14 Vt. 540. This liability, however, depends on principles of estoppel and not on general grounds of policy. *Rogers v. Murray*, 110 N. Y. 658, 18 N. E. 261. *Cf. Poillon v. Secor*, 61 N. Y. 456. Accordingly, if the person dealing with the firm does not know of the holding out or does not rely on it in so dealing, the nominal partner will not be liable. *Thompson v. First National Bank of Toledo*, 111 U. S. 529; *Wood v. Pennell*, 51 Me. 52. Contracts made with the ostensible firm frequently involve this reliance on the partnership. *Rice v. Barrett*, 116 Mass. 312. Tort liability, on the other hand, ordinarily arises without reference to the mental attitude of the injured person, and the basis for recovery against the nominal partner is, therefore, lacking. *Smith v. Bailey*, [1891] 2 Q. B. 403; *Shapard v. Hynes*, 104 Fed. 449. But when the tort arises out of a relation undertaken in reliance on the holding out, the necessary elements of estoppel seem to be present. *Maxwell v. Gibbs*, 32 Ia. 32. It is submitted that this same principle is the real basis of liability in certain cases of so-called "implied invitation." See *Holmes v. Drew*, 151 Mass. 578. Accordingly, in the principal case, if in fact the plaintiff had relied on the representation that the retired partner was still a member of the firm, in entering upon the relation of invitee, the liability would have been properly imposed. But inasmuch as the facts did not warrant that construction, the dissenting judges rightly refused to be satisfied with anything less than estoppel.

POLICE POWER — INTEREST OF PUBLIC ORDER — VALIDITY OF STATUTE PROHIBITING THE USE OF RED FLAGS IN PARADES. — Under a statute providing that "no red or black flag . . . shall be carried in parade within this commonwealth," the defendant was convicted for carrying a red flag in the parade of a Socialist organization. *Held*, that the statute is constitutional. *Commonwealth v. Karvonen*, 106 N. E. 556 (Mass.).

Courts cannot protect the people from unwise or oppressive legislation ex-

cept when it is inconsistent with some constitutional provision which comes within judicial cognizance. COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 236. An enactment of the legislature, no matter how freakish in nature, cannot be declared void by the courts if it has any reasonable bearing upon the protection of public health, morals, safety, order or welfare. *Hammer v. State*, 173 Ind. 199, 89 N. E. 850. Moreover, if the statute has a direct relation to the evil sought to be remedied, it is not fatal that it may affect those innocent of the evil at which it is aimed. *United States ex rel. Turner v. Williams*, 194 U. S. 279, 294. The regulation of street parades is, of course, within the police power of the state, and statutes or ordinances on the subject will be sustained unless unreasonable, or outside the scope of the powers delegated to the municipality. *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224. Cf. *Anderson v. City of Wellington*, 40 Kan. 173, 19 Pac. 719. The police power, however, has some limits. Thus legislation making it a crime for a girl under twenty-one to enter a Chinese restaurant, or a statute requiring horseshoers to pass an examination, would be invalid. *Opinion of the Justices*, 207 Mass. 601, 94 N. E. 558; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215. But in the principal case it would seem that the carrying of a red flag has enough of a connection with acts of disorder to warrant the enactment of the statute in the interest of public order. Opinions may differ as to its policy, but if there is dissatisfaction, recourse must be had to the legislature and not to the courts.

POWERS — APPOINTMENT TO REMAINDERMAN — EFFECT OF PARTIAL APPOINTMENT TO OTHERS ON RIGHT TO ELECTION. — The testator left property in trust for his daughter for life, then to such persons as she should by will appoint, and in default of such last will to be distributed as if she had died intestate. By will she appointed part of the fund for the payment of debts, and the balance to those who would have taken on default of appointment. These appointees now seek to escape payment of the transfer tax by electing to take under the original will instead of under the power. *Held*, that they must take under the power. *Estate of Josephine Slosson*, N. Y. L. J., Nov. 5, 1914 (Surr. Ct., N. Y. County).

Where a power of appointment is completely exercised in favor of the person who would take in default of appointment, the New York courts have held that he can elect to take under the will instead of under the power. *Matter of Lansing*, 182 N. Y. 238, 74 N. E. 882; *Matter of Haggerty*, 128 App. Div. 479, 112 N. Y. Supp. 1017. The argument is that, while there has been at least a formal exercise of the power, the remainderman takes nothing different than he would have had under the original will, and should therefore be permitted to elect to disregard the appointment. Somewhat analogous is the case where land is specifically devised to the heir. There the law has been that the worthier title prevails and that the heir takes by descent. *Sedgwick v. Minot*, 6 Allen (Mass.) 171. But this rule has been changed in England by statute, so that the heir now takes by devise. 3 & 4 WM. IV, c. 106, § 3. A doctrine of equal rigidity concerning appointments to remaindermen may well be preferable to the rule allowing an election. See 19 HARV. L. REV. 139. But whatever their comparative merits, the principal case seems to set an arbitrary limitation on the New York view. For where the donee of the power has appointed in part to others, and the balance to those who take on default, the appointees who are remaindermen take just what they would have received had the power not been exercised as to the balance, and they should have an equal right to elect to take under the original will.

QUASI-CONTRACTS — MONEY PAID UNDER DURESS OR COMPULSION OF LAW — THREAT OF LEGAL PROCEEDINGS. — In a suit to recover money paid under

duress, the declaration alleged that the defendant had installed fixtures in a building of which the plaintiff was general contractor, that the defendant had been paid the full price, but falsely and fraudulently claimed an additional sum for extra work and threatened to bring a replevin suit to remove the fixtures unless the extra sum was paid; and that the plaintiff thereupon paid this demand under compulsion, to prevent irreparable injury. *Held*, that the declaration does not state facts sufficient to constitute a cause of action. *James C. McGuire & Co. v. H. G. Vogel Co.*, 149 N. Y. Supp. 756 (App. Div.).

Money paid under duress is recoverable upon the equitable doctrine of unjust enrichment, so long as there is enough compulsion to negative voluntary payment. *Koenig v. People's Gas, etc. Co.*, 153 Ill. App. 432. But the law will not lightly undo private settlements of disputed claims, made with full knowledge of the facts, even though the claim proves unfounded. *Pearl v. Whitehouse*, 52 N. H. 254. Ordinarily, therefore, money paid upon a threat of legal proceedings may not be recovered. *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35. If the threat is honestly made, and presents the alternative of paying the contested claim or awaiting a court adjudication, a party will not be acting under compulsion when he chooses the former. *Parker v. Lancaster*, 84 Me. 512, 24 Atl. 952. *New Orleans & N. E. R. Co. v. Louisiana, etc. Co.*, 109 La. 13, 33 So. 51. But where the threat is made in bad faith by one having an oppressive advantage of position, so that the alternative of surrender is irreparable injury or immediate hardship, the duress is sufficient to justify a recovery of payments made. *Sartwell v. Horton*, 28 Vt. 370; *Swift & Co. v. United States*, 111 U. S. 22. In the principal case the parties appear to have been on an equal footing, and in spite of the dishonesty of the claim, there seems to have been nothing equivalent to compulsion in the dealings between them.

RESCISSION — RESCISSION FOR FRAUD OR MISTAKE — RESTORATION OF CONSIDERATION BY RESCINDING PARTY: WHEN EXCUSED. — A purchased municipal bonds from B under a contract induced by fraud of B. He paid B approximately one quarter of the price in stock and the rest in cash. After litigation, A was able to collect the face value of the bonds from the municipality, but lost the interest. The stock was pledged by B to the plaintiff, who being sued by A and B for the stock and dividends, brings a bill of interpleader. B now being insolvent, A in his answer demands the stock and dividends under a rescission of the contract, without offering to return the value of the bonds. *Held*, that A may recover. *Page Belting Co. v. F. H. Prince & Co.*, 91 Atl. 961 (N. H.).

For a discussion of the principles involved and of the necessity in general of putting the defendant in *statu quo*, see this issue of the REVIEW, p. 315.

TORTS — UNUSUAL CASES OF TORT LIABILITY — REIMBURSEMENT FOR PAYMENT MADE UNDER WORKMEN'S COMPENSATION ACTS. — An employee, whose master had accepted the optional clause of an employers' liability act, was injured in the course of his employment through the negligence of a third person not a fellow-servant. The employer, who was compelled by the act to compensate the workman, now sues the negligent third person to recover the payments made under the act. *Held*, that he cannot recover. *Interstate Telephone and Telegraph Co. v. Public Service Electric Co.*, 90 Atl. 1062 (N. J.).

For a discussion of this case on principles of tort liability, and in view of the policy of the workmen's compensation acts, see NOTES, p. 307.

TRUSTS — *Cestui's* INTEREST IN THE *Res* — LIFE TENANT'S RIGHT TO ACTUAL INCOME FROM UNAUTHORIZED INVESTMENTS. — The testator left property in trust for conversion with full power of postponement, and directed

the trustees to divide "the trust premises constituting or representing" the residuary estate into certain shares and to pay the income of each share to a tenant for life with remainders over. The estate was composed of both authorized and unauthorized investments. *Held*, that the life tenants should enjoy the actual income from the unauthorized investments, pending conversion. *In re Godfree*, [1914] 2 Ch. 110.

When there is a trust for the benefit of life tenants and remaindermen, with an express provision for conversion or a duty to convert because the property is not properly invested, the gross fund is treated as converted from the date of the testator's death, and the life tenant is given the income that would have been earned, had the money then been properly invested. *Edwards v. Edwards*, 183 Mass. 581, 67 N. E. 658; *Brown v. Gellatly*, L. R. 2 Ch. App. 751. The courts aim to carry out the will of the testator, however, and the life tenant will take the actual income when such an intention appears. *In re Hubbuck*, [1896] 1 Ch. 754. Some jurisdictions deduce such an intention from the absence of a direction to convert. *Heighe v. Littig*, 63 Md. 301. See *Patterson v. Vivian*, 63 N. Y. Misc. 389, 399, 117 N. Y. Supp. 504, 510. But the better rule presumes from the gift to life tenants and remaindermen that the testator intended each to receive equal benefits, and therefore requires conversion unless some positive indication appears that the property was to be enjoyed *in specie*. *Porter v. Baddeley*, 5 Ch. D. 542. See PERRY, TRUSTS, 6 ed., p. 900. The English courts, however, seem to except income-producing land from this rule. *In re Oliver*, [1908] 2 Ch. 74. They also distinguish cases where there is an express power given to trustees to convert the estate or not at their absolute discretion. *Yates v. Yates*, 28 Beav. 637; *In re Pitcairn*, [1896] 2 Ch. 199. The principal case deserves criticism, in that it further impairs the general rule, and finds an intention that the property be enjoyed *in specie*, by a strained construction of the words "constituting or representing."

TRUSTS — CREATION AND VALIDITY — RESERVATION OF POWER TO REVOKE: LIABILITY TO TRANSFER TAX. — A donor executed a deed conveying property to a trustee on certain trusts, reserving an absolute power to amend or revoke the trust. A statute provided that transfers of property "by deed made in contemplation of the death of the grantor or intended to take effect in possession at or after such death" should be subject to a transfer tax. CONSOL. LAWS N. Y., TAX LAW, § 220, subd. 4. *Held*, that the trust fund is subject to a tax on the death of the donor. *In re Hoyt's Estate*, 86 N. Y. Misc. 696, 149 N. Y. Supp. 91.

The court imposes the tax on the ground that the transfer was "intended to take effect in possession at or after the donor's death." If this means that no trust was created until that time, the gift would be invalid as a testamentary disposition. *McEvoy v. Boston Five Cents Savings Bank*, 201 Mass. 50, 87 N. E. 465; *Nicklas v. Parker*, 71 N. J. Eq. 777, 71 Atl. 1135. That this is a difficulty however which does not appeal very strongly to the New York courts is apparent from their doctrine of "tentative trusts." *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748. It is clear, moreover, that the mere reservation of a power to revoke did not invalidate the trust under the Statute of Wills. *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257; *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615. But it is still open to the court to hold that the power to revoke shows such an intention to evade the inheritance tax that the trust is a testamentary disposition under the transfer tax laws. *Matter of Bostwick*, 160 N. Y. 489, 55 N. E. 208. It might have been a more satisfactory ground of decision to construe "in contemplation of death" to include gifts made *inter vivos* with an intent to escape the tax. Earlier New York cases, however, seem to exclude such an interpretation of the statute. *Matter of Spaulding*, 49 App. Div. 541, 63 N. Y. Supp. 694 (aff'd, 163 N. Y. 607, 57 N. E. 1124); *Matter of*

Mahlstedt, 67 App. Div. 176, 73 N. Y. Supp. 818 (aff'd, 171 N. Y. 652, 63 N. E. 1119). Whatever line of reasoning be adopted, the principal case reaches a result which seems essential in order to prevent wholesale evasions of the tax.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEE — INVESTMENT OF TRUST FUNDS IN PARTICIPATING MORTGAGE IN TRUSTEE'S NAME. — A trust company invested the funds of several unrelated trusts in one mortgage, which it took in its own name, without any indication of the trust. Accurate accounts of the shares contributed by the various funds were kept, the security was ample, and the company could liquidate the investment of any of the funds at any time. *Held*, that the participating mortgage in the name of the trustee is improper. *In re Union Trust Co. of New York*, 149 N. Y. Supp. 324 (Surr. Ct., King's County).

The case is clearly right in holding that the investment in the trustee's own name was improper. *Corya v. Corya*, 119 Ind. 593, 22 N. E. 3; *In re Arguello*, 97 Cal. 196, 31 Pac. 937. The court also fully appreciated the dangers inherent in the mingling of the funds of different trusts in participating mortgages, but felt constrained by authority to uphold that feature of the investment because of its practical advantages. See *Chesterman v. Eyland*, 81 N. Y. 398; *Barry v. Lambert*, 98 N. Y. 300; *Graver's Appeal*, 50 Pa. 189. The weight of authority, however, forbids the investment of trust moneys in contributing mortgages, which deprive the trustee of control of the fund, and involve the beneficiaries' rights with those of strangers. *Webb v. Jonas*, 39 Ch. D. 660. It has also been held improper for a trustee to invest the funds of several unrelated trusts in a common or participating mortgage. *McCullough's Executors v. McCullough*, 44 N. J. Eq. 313, 14 Atl. 642. On principle, this attitude appears correct, for while the trustee retains control of the whole security, as he does not in the case of a contributing mortgage, he is nevertheless subject to conflicting duties to the several *cestuis*. There is also the constant danger of complications from the appointment of a new trustee for some of the funds, so that the system on the whole, in spite of its advantages in a given case, does not seem to merit judicial approval.

WAR — PRIZE — CAPTURE OF VESSEL TRANSFERRED TO DOMESTIC CORPORATION COMPOSED OF ALIEN ENEMIES. — Two vessels of German registry, owned by a German company, while *en route* from Hamburg to London, were sold by telegraph on August 1 to an English corporation controlled by the stockholders of the German company. On August 5, the day after the declaration of war, the vessels arrived at an English port, still flying the German flag, and were there seized as prizes. In a suit for their detention, the English corporation put in a claim that the transfer of ownership invalidated the seizure. *Held*, that the claim should be dismissed. *The Tommi and The Rothersand*, 59 Sol. J. 26 (Prize Court).

It is settled that all transfers of ownership *in transitu* are void when made during or in contemplation of hostilities, in order to avoid capture. *The Jan Frederick*, 5 C. Rob. 128; see *The Ann Green*, 1 Gall. (U. S.) 274, 291. See also 28 HARV. L. REV. 188, 190. Moreover, the German registry and flag are conclusive against the claimant. *The Danckebaar Afrikaan*, 1 C. Rob. 107, 113. See Declaration of London, art. 57; 28 HARV. L. REV. 217. The court further suggests that in spite of the formal transfer, the vessels might still be considered as German-owned because the English corporation was in reality substantially identical with the German company. It is possible that the intimation of the court was broader, and meant to imply that prize law might disregard the corporate fiction wherever the shareholders were alien enemies. The point, however, has never been decided, probably because the seizure has

always been justifiable on other grounds, as in the principal case. For purposes of municipal law, the corporate fiction has been respected and the vessels of an English corporation composed of alien stockholders have been held entitled to British registry. *The Queen v. Arnaud*, 16 L. J. Q. B. N. S. 50. Similarly it has just been held that an English corporation, composed almost entirely of alien enemies, can sue in the English courts. *Continental Tyre & Rubber Co. v. Thomas Tilly, Ltd.*, 138 L. T. J. 83. It is submitted that the prize court should likewise refuse to disregard the corporate fiction as to vessels owned by such a corporation. It involves no disregard of the fiction, however, to inquire who the stockholders are, and a rule of prize that vessels owned by corporations so constituted should be subject to capture, might well be adopted.

WAREHOUSEMEN — WAREHOUSE RECEIPTS — LIABILITY FOR FRAUDULENT ISSUANCE BY AGENT: EFFECT OF UNIFORM WAREHOUSE RECEIPTS ACT. — The general manager of a warehouse, who had no authority to issue receipts except upon receiving goods, issued and sold to the plaintiff warehouse receipts for goods which in fact had never been received. The plaintiff now sues the warehouseman for non-delivery of the goods. *Held*, that he cannot recover. *Rosenberg v. National Dock & Storage Co.*, 218 Mass. 518, 106 N. E. 171.

There has been great conflict of authority concerning the liability of warehousemen upon warehouse receipts issued by agents, without specific authority, for goods which have never been received. See WILLISTON, *SALES*, § 419. Previous to its adoption of the Uniform Warehouse Receipts Act, Massachusetts took the view that the warehouseman was not liable, on the ground that the agent acted outside the scope of his employment. *Sears v. Wingate*, 3 Allen (Mass.) 103. Section 20 of the uniform law, however, provides that "a warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods." MASS. STAT. 1907, c. 582, § 21. See MOHUN, *WAREHOUSEMEN*, 2 ed., p. 7. The principal case decides that this provision has made no change in the law. It seems impossible to quarrel with this conclusion, no matter what one may think of the soundness of the position previously taken. The statute was not intended to alter the several rules of agency conceived to be applicable to the case. Its words receive their full meaning as a definition of the warehouseman's liability when a receipt is issued with authority. To the purchaser of a receipt fraudulently issued by an agent the statute gives no additional protection, for he is not even a "holder of a receipt" within the meaning of § 58 of the uniform law.

WILLS — CONSTRUCTION — CONDITION FOR FORFEITURE IN CASE OF CONTEST BY LEGATEE. — A testator provided in his will that if any person named in the will should dispute its validity, his legacy should fall into the residue. A legatee unsuccessfully attempted without reasonable grounds to probate an invalid will. She now petitions for payment of the legacy. *Held*, that the legacy is forfeited. *In re Kirkholder's Estate*, 149 N. Y. Supp. 87 (Surr. Ct., Erie County).

The American authorities in regard to conditions providing for the forfeiture of the gift to a beneficiary who contests the will, tend to discard any requirement of a gift over, and to make no distinction between real and personal property. See 2 REDFIELD, *WILLS*, *298; 25 HARV. L. REV. 745. But the validity of such conditions is still much in dispute. On this broader question, some jurisdictions hold that even a contest on reasonable grounds works a forfeiture. *Smithsonian Institute v. Meech*, 169 U. S. 398; *In re Miller's Estate*, 156 Cal. 119, 103 Pac. 842; *Moran v. Moran*, 144 Ia. 451, 123 N. W. 202. Others, however, will not permit a reasonable contest to forfeit the gift, because of

the public policy against affording protection to possible fraud, coercion, or forgery. *Friend's Estate*, 209 Pa. 442, 58 Atl. 853; *Rouse v. Branch*, 91 S. C. 111, 74 S. E. 113. See *Chew's Appeal*, 45 Pa. 228, 232. This policy appears to exist, and wherever possible conditions should be construed to apply only to unreasonable contests. If, however, a condition seems clearly intended to apply to all contests, it is submitted that it must be held entirely inoperative. It is true as a general proposition that where the testator's intention cannot operate to its full extent, it should take effect as far as possible. 2 JARMAN, WILLS, 6 Eng. ed., p. 2212. But this is subject to the qualification that the provisions introduced by the testator cannot be remoulded by the court. If an inseparable provision is void as a whole, no single part of it will be enforced separately. *Root v. Stuyvesant*, 18 Wend. (N. Y.) 257, 310; *Leake v. Robinson*, 2 Mer. 363, 390; *Ker v. Hamilton*, 6 Vict. L. R. Eq. 172. See 9 HARV. L. REV. 242. Cf. *Edgerley v. Barker*, 66 N. H. 434, 31 Atl. 900. A condition still broad enough to cover all contests, after the limit of construction has been reached, would appear to fall within the principle of these cases.

BOOK REVIEWS

American Contributions to Jurisprudence. — In the field of jurisprudence we have until very recently drawn our ideas from abroad. Not only that, but we have imported such foreign ideas as finished products and attempted very little creative adaptation to our own needs. In the beginning the civilians, by way of France and England, supplied our juristic market. More recently we have drawn on Germany. This indiscriminate importation of foreign ideas is but natural so long as we did not vigorously realize that a philosophy of law is the practical concern of lawyers, because some philosophy, consciously or unconsciously, underlies the administration of every legal system. Once this is realized the largest impulse is given to an endeavor to work out a philosophy of law from the mass of our own jural material, in the light of our own history, designed for our own particular needs. Of course, this involves drawing on the experience of other countries and other systems of laws in so far as the administration of law everywhere is an expression of the ideal of justice. This is so particularly in the present day interdependence of the world. But the conscious pursuit of a native philosophy of law, by an intensive regard for differences of time and place and circumstance, will avoid the dangers of mechanical uniformity and the inadequacies of an aspiring but not all-inclusive internationalism.

Such a philosophic movement is taking a decided part in the present readjustment of our legal system, and to a promising degree it is manifesting itself in the practical, everyday decisions of our courts throughout the whole field of law, — criminal law, property law, torts, public service law, constitutional law. Not only our own legal thinking, however, is it affecting. It is a matter of profound significance in the juristic history of this country that we are actually beginning to export ideas. A very striking acknowledgment of this fact has recently been made by a distinguished German jurist, Professor Rudolf Leonhard, in a review of several essays of Professor Roscoe Pound (*Archiv für Rechts- und Wirtschaftsphilosophie*, Band VIII, Heft 1). This follows closely on Professor Leonhard's translation of Holmes's Common Law. These articles by Professor Pound¹ are chapters from his forthcoming work

¹ Justice According To Law, — 13 COL. L. REV. 696; 14 *ib.* 1, 103.

The End of the Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195.

on Sociological Jurisprudence which is eagerly awaited. As a penetrating survey of the contribution America has made through Professor Pound, a translation of Professor Leonhard's critique cannot fail to interest the profession. After an introductory word, Professor Leonhard proceeds as follows:

"These essays afford a valuable foundation for a supranational, or rather bird's-eye comparison of modes of thought which either repeat themselves in the legal system of different nations or are differentiated from one another because of differences in their conditions of life. Such a comparative method involves not merely a reciprocal exchange and an approach toward future unity; it also arouses the consciousness that a sense of spiritual kinship has already been achieved through the course of history.

"Just as in each country the history of the law and the existing legal system are juxtaposed, so we may compare the historical development of different legal systems with a supranational system of law, which would afford a survey of the main forms of the separate legal systems. In both these branches of investigation the writer has sketched a program in bold and keen strokes, the detailed execution of which may well entice all who desire to build a general jurisprudence on the solid foundation of experience and not to derive it from *a priori* principles. The author deals with comparative legal history in the REVIEW of his own university, with comparative juristic philosophy, in the COLUMBIA LAW REVIEW. Along these lines more is promised us, but what he has already furnished is an entirety worthy of attention.

"As a point of departure let us take the related conclusions of both essays, for they concern two tendencies which recently have become very active with us: sociological jurisprudence and the school of judicial freedom (*freies Recht*). With us, at times, both are mentioned in the same breath, as, for instance, by Oertmann, in his *Rechtsordnung und Verkehrssitte*. It is interesting therefore to note how sharply Pound differentiates them. He praises one and combats the other. In this result his philosophic analysis harmonizes with his historical analysis.

"The latter finds strong support in Jhering, who enjoys much authority in America. The very name given to his treatise, 'End of Law,' shows this. On the other hand, Pound does not dwell on the many individual purposes which give law its manifold content. He confines himself to the dominant ultimate purpose which gives to law, in its various stages of development, its characteristic feature. He therefore seeks a history of this ultimate purpose; the shifting change in this purpose being his point of departure. In this investigation he does not confine himself to the law of any one people. On the contrary, like unto the eagle hovering above the clouds, he scans the various juristic developments of all civilized nations in order to ascertain, through a comparative legal history, the common laws of evolution. He draws a particularly close parallel between the Roman and the English law in which, as I believe, similarities unduly tend to overshadow differences.

The development of the legal system discloses five stages: archaic law, strict law, equitable and natural law, the maturity of the law, and finally the socialization of law, which is described with some reliance on Jhering. Peace at any price enforced through unlimited judicial discretion is the purpose of archaic law. In the second period, formalism reigns as the guardian of liberty (following Jhering). In the third period, a reaction sets in against formalism in the direction of equity and morality. The maturity of the law aims at certainty and equality by applying a system of concepts. Finally, in the present period, the social interest back of each right is sought to be ascertained in order that the end of the law may be founded not merely on moral considerations, as in the period of equity, but likewise upon social and political considerations. This is illustrated by numerous examples.

"That there is danger that this new sociological mode of thought may have

a disproportionate influence compared with the traditional element of the law is the subject of the essay in the *COLUMBIA LAW REVIEW*. 'Justice without law' and 'justice according to law' are contrasted as the two main forms in legal administration. Law in the sense here used means the customary traditional law as the antithesis of the undefined *jus incertum*. Having regard to the theory of the separation of powers, the essay considers three possibilities: administration of justice by the legislature, by the executive, and by a professional judiciary. By a wealth of examples, drawn from American and English legal history, the advantages of a professional judiciary are maintained against certain modern tendencies. Pound fears an undue dominance of the newer social sciences over the traditional basis of our social order, which leads him to conclude that the socialization of the law must be attained through a study of the underlying problems and not through a relapse to justice without law, in other words, an administration of 'law' without certainty.

"Pound notes acutely that this is a danger peculiar to America and England, and it does not prevail to any such degree on the continent. 'Whereas we say a rule is law because the courts apply it in the decision of causes, they say on the Continent that the courts apply the rule in the decision of causes because it is law.'

"In this he touches the dividing line for a fundamental differentiation, founded on legal history. Between the fourth and fifth stages, — those of the maturity of the law and its socialization, — there is an intermediate stage for the Continent which has been spared both England and America, a stage of codification, the thoroughgoing transformation of the law formulated in doctrinal writings and reports into comprehensive codes. These constituted an effective dam against the strongest currents of socialization, such as are not afforded by the authoritative decisions in England and America, because these may be overruled. In the earlier and undeveloped days of social sciences the danger was not so much felt. It is true the law has been sociologic at every stage of its development. For on reflection it must be clear that the whole history of law is nothing but a continuous process of socialization, that is, an eternal adaptation to changing conditions. The pace, the emphasis, however, has become quite different since the end of law is the subject of systematic criticism both by scholars and the daily press. The amount of well-founded dissatisfaction which we produce was not dreamt of in the past. That we yield to such dissatisfaction is undoubtedly a step forward, but a step that is beginning to get uncomfortable. Radical socialistic tendencies have appeared rather late in America, but they are beginning to arouse very serious concern. Thus the late American ambassador to Berlin, David Jayne Hill, notes that formerly people were apt to regard legal institutions as a fixed Newtonian planetary system, while now it is regarded as a continuous process of Darwinian development without, however, granting to the law the deliberate development of Darwin's evolution (see 'Taking Soundings,' by David Jayne Hill, *North American Review*, May, 1914). However, one cannot wave aside the pressure of ameliorating change which has its source in the sociological thought of our day. With us it drives toward a certain 'unshackling' of jurisprudence; in other words, a freer treatment of the traditional material. Perhaps in England and America it will so far affect usage that they will finally overcome their inherited dislike of codes in order to erect some sort of dam for the protection of the traditional elements of the law. Very likely, however, such codes will there be very sparing in the use of definite rules and will permit of considerable flexibility in application. If this should come to pass, the two great juristic branches of European civilization, — the Anglo-American and the continental European, — will be compelled to meet one another half way. In any case one can learn much from the other. Pound's stimulating essays certainly demonstrate that."

F. F.

CASES ON CONSTITUTIONAL LAW. By James Parker Hall. St. Paul: West Publishing Company. 1913. pp. xxxii, 1452.

This is a large volume, and its pages are crowded with matter. The cases deemed worthy of full presentation are placed in the text, with statements of facts, — usually rewritten, — without arguments of counsel, and with liberal extracts from the opinions. The cases thus presented number about two hundred and twenty-four. The text further presents many more cases in an abbreviated form which includes extracts from opinions and, when necessary, a short indication of the questions. Still more cases are found in the footnotes, usually with indications of the questions, and frequently with quotations. Besides giving citations, the footnotes sometimes give the editor's statements of propositions of law. The result is that the text and notes taken together cover the subject well.

The volume is divided into forty-eight subdivisions, which are grouped in twenty chapters. Within each subdivision the cases are arranged not in a chronological order, but in an order intended to emphasize their logical relation.

Obviously this is a volume upon which great labor has been spent; and as the making of a case-book is sometimes, properly enough, a thankless task, it is pleasant to be able to say that here is a piece of work which will be found useful by any person who takes a scholarly interest in Constitutional Law.

E. W.

THE DOCTRINE OF JUDICIAL REVIEW. By Edwin S. Corwin. Princeton: Princeton University Press. 1914. pp. vii, 177.

This volume consists of five essays entitled: "*Marbury v. Madison* and the Doctrine of Judicial Review"; "We the People"; "The Peletiah Webster Myth"; "The Dred Scott Decision"; and "Some Possibilities in the Way of Treaty-Making." These topics are obviously interesting to lawyers; but the volume is not peculiarly addressed to them, for, as the author is a professor of history, the point of view is historical and not legal. The author's researches into the history of what he calls the "doctrine of judicial review," — that is to say, the power and duty of a court to disregard *ultra vires* legislative acts, — have resulted in gathering citations which the scholarly lawyer will appreciate (pp. 65-78). The puncturing of what the author well terms "the Peletiah Webster Myth" is also a good deed. Here and there are passages somewhat shocking to a lawyer. One example is a distinctly non-professional use of the word *dictum* (p. 134). Another is the rather disrespectful explanation of the opinion of the Supreme Court of the United States in *Marbury v. Madison* (pp. 9-10). Indeed the judicious lawyer will find in many places reason to indulge in the philosophical reflection that if lawyers do not write the history of law for themselves, they have little right to object to what is being done by those who, being primarily interested in history or in the science of government, lay upon law and its history somewhat unsanctified hands.

E. W.

A TREATISE ON ATTORNEYS AT LAW. Volumes I and II. By the late Edward M. Thornton. Northport, N. Y.: Edward Thompson Company. 1914. pp. cclxxx, 1499.

This is a laborious work, full of curious learning about lawyers and equally full of cases involving their rights and liabilities. A mere catalogue of the chapters will show the various and miscellaneous character of the subjects treated, — all strung upon the thread, attorney: admission to practice; tax-

ation of attorneys; unauthorized practice; privileges, exemptions, disabilities; libel and slander; assignment of counsel by the court; *amicus curiae*; privileged communications; relation of attorney and client; substitution of attorneys; imputed notice and knowledge; dealings between attorney and client acquiring adverse interests; representing conflicting interests; law partnerships; attorneys as witnesses; admissions by attorneys as evidence; scope of attorney's authority; delegation of authority; ratification of unauthorized acts; authority to compromise or release; authority to appear for litigants; authority in conducting litigation; liability generally; liability for negligence; enforcement of liability; advice of counsel; champerty, barratry and maintenance; right to compensation; contracts for compensation; amount, retention and allowance of compensation; taxable costs and expenses; actions to recover compensation; liens generally; rights and property affected by lien; settlement, dismissal, substitution, assignment and set-off as affecting lien rights; enforcement of liens; prosecuting attorneys; attorney-general; suspension and disbarment generally; grounds for disbarment; procedure, judgment and punishment; review of disbarment proceedings; reinstatement.

That every one of these numerous subjects should be treated fully is not to be expected. The first portion of the work, especially, is a scrappy and imperfect summary of facts, learned from secondary sources; and the author's tendency to state a fact or practice as generally true, where he is relying upon an example from a single state, is not commendable. Much may be explained, however, by the fact that the book was published posthumously, and the author was therefore unable to complete parts which he had merely sketched in his original manuscript. As we reach the chapter in which important principles of law appear, we find a much more finished work; an admirable book of its type. It is a digest of decisions, clearly and accurately stated, and following one after the other in good, logical order. The reviewer has not chanced to find a single passage in which an original opinion has been hazarded by the author, or a conflict or doubt solved, a case criticised or explained, or even a reason for a rule given. "It is a general rule that" appears to be the utmost flight of the author's original fancy.

Yet it is withal a good book. Without praising it for what it is not, one may warmly commend it for what it is: a compendium of legal information about attorneys, a key to the cases, an encyclopædic article several years later than any encyclopædia.

J. H. B.

THE EVIDENCE IN THE CASE. By James M. Beck. New York: G. P. Putnam's Sons. 1914. pp. xxiv, 200.

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INTERESTS OF PERSONALITY

I. INTERESTS¹

A LEGAL system attains its end by recognizing certain interests, — individual, public, and social, — by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavoring to secure the interests so recognized within the defined limits. It does not create these interests. There is so much truth in the old theories of natural rights. Undoubtedly the progress of society and the development of government increase the demands which individuals may make, and so increase the number and variety of these interests.² But they arise, apart from the law, through

NOTE. The substance of this paper will appear in Chapter IX of a book entitled "Sociological Jurisprudence," now in preparation.

¹ Ritchie, *Natural Rights*; Spencer, *Justice*, chs. 9-18; Paulsen, *Ethics* (Thilly's trans.), 633-637; Green, *Principles of Political Obligation*, §§ 30-31; Lorimer, *Institutes of Law*, ch. 7; Demogue, *Notions fondamentales du droit privé*, 405-443; Ahrens, *Cours de droit naturel*, 8 ed., II, §§ 43-88; Hegel, *Grundlinien der Philosophie des Rechts*, §§ 34-104; Fichte, *Grundlage des Naturrechts*, §§ 18, 19, *Erster Anhang*, §§ 1-61 (Kroeger's trans., 298-343, 391-469); Beaussire, *Les principes du droit*, bk. III; Lasson, *System der Rechtsphilosophie*, §§ 48-56; Boistel, *Philosophie du droit*, I, §§ 96-241; Kohler, *Lehrbuch der Rechtsphilosophie*, 91-142; Miraglia, *Comparative Legal Philosophy* (Lisle's Trans.), bk. II, chs. 1, 2.

² "A man's rights multiply as his opportunities and capacities develop. . . . The more civilized the nation, the richer he is in rights." Miraglia, *Comparative Legal Philosophy* (Lisle's trans.), 324. The idea here is that interests, — that is, demands of the individual, — increase with increasing civilization, and hence the

the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognizes them. Yet it does not have for its sole function to recognize interests which exist independently. It must determine which it will recognize, it must define the extent to which it will give effect to them in view of other interests, — individual, public, or social, — and the possibilities of effective interference by law, and it must devise the means by which they are to be secured. Hence in determining the scope and subject-matter of a legal system we have to consider (1) the interests which it may be asserted the law ought to recognize and to secure; (2) the principles upon which interests are to be selected for such recognition and securing; (3) the principles upon which such interests should be defined and limited for the purposes of legal recognition, or, in other words, the principles upon which conflicting interests should be weighed or balanced in order to determine the extent to which the respective interests are to be given effect; (4) the means by which the law may secure the interests which it recognizes; and (5) the limitations upon effective legal action which preclude complete recognition or complete securing of all these interests to the full extent which ethical considerations might require.

Strictly the concern of the law is with social interests, since it is the social interest in securing the individual interest that must determine the law to secure it. But using interest to mean a claim which a human being or a group of human beings may make, it is convenient to speak of individual interests, public interests, — that is, interests of the state as a juristic person, — and social interests, — that is, interests of the community at large. This is the order in which they have been recognized in the development of juristic thought.

Although certain great social interests have determined the growth of law from the beginning, individual interests were the first to be worked out critically. The social interest in general security required that these interests be provided for in order to prevent self-redress and private war. For nearly three centuries

pressure upon the law to meet these interests increases the scope and character of legal rights.

now, philosophical jurisprudence has devoted itself to this task. The more important of them have become well known to us under the name of natural rights. Usually they have been deduced from the qualities of man in the abstract or from some formula of right or justice. But the practice of jurists has often been sounder than their theories have been. So far as individual interests go, the sociological jurist has little to do beyond essaying to supply a better theoretical foundation.

With respect to public interests, the situation is very different. These were first thought of as individual interests of the personal sovereign and hence were worked out originally in jurisprudence on the analogy of individual interests. Moreover, since the sovereign is, as it were, the guardian of social interests,³ these also were at first treated as individual interests of the sovereign and worked out on the same analogy of private rights. Hence there is much confused thinking in jurisprudence at this point. General social interests and interests of the state as a juristic person are not differentiated, and both are spoken of as "rights" of the state. The persistence in American public law of the royal prerogative of dishonesty, and the resistance of American lawyers to attempts to introduce ideas on this subject which are familiar to the rest of the world, afford but another instance of the practical effect of theoretical confusion in retarding the growth of the law.

Turning to social interests, the sociological jurist has in a sense a clear field. As such we have only begun to recognize them. Yet the social interest in general security was the first interest secured by the law. It is not too much to say that law came into being to secure this interest. Unhappily, in the nineteenth century legal history was written from an individualist standpoint and was interpreted as a development of restrictions on individual aggression in the interest of individual freedom of action. When

³ At common law the king was *parens patriæ*, that is, he was guardian of social interests of all kinds and hence his courts of law and equity had a general superintendence of all manner of matters where social interests might be jeopardized. Coke, Second Institute, 199; Blackstone, Commentaries, II, 427, III, 110, 112, 362; *Attorney-General v. Newman*, 1 Ch. Cas. 157 (1735); *Attorney-General v. Richards*, 2 Anstr. 603, 606 (1794). As the king enforced the duties imposed to secure these interests, the common-law lawyer naturally thinks here of rights of the state. See Pollock, First Book of Jurisprudence, 3 ed., 64-65.

we recognize that this was a mistake and that the social interest in general security dictated the very beginnings of law, so that individual rights were only a means gradually worked out for furthering this social interest, and rewrite our legal histories accordingly, we shall be able to make historical jurisprudence more effective.⁴ In the same way much that has been written as to individual natural rights, when recast from the standpoint of a social interest in security of acquisitions, may be made useful. But the jurist cannot work alone at this task. In order to construct a scheme of social interests that will serve the jurisprudence of tomorrow as the thoroughly elaborated schemes of natural rights served the jurisprudence of yesterday, the social sciences must coöperate. This does not mean that any jurist shall take all the social sciences for his province. It does mean, however, that he shall know that they all have materials for him and shall be willing and able to go to them therefor.

2. INDIVIDUAL INTERESTS⁵

Individual interests which it is conceived the law ought to secure are usually called "natural rights" because they are not the creatures of the state and it is held that the pressure of these interests has brought about the state. In the stage of equity or natural law, when what ought to be law is made the test of what is, it is natural to confuse the interests which the law does secure, the interests it ought to secure, and the means of securing them under the one name of "rights." Those which are secured and the means whereby they are secured are called legal rights; those which ought to be secured are called natural rights. The usual mode of proceeding has been to deduce natural rights from a supposed social compact or from the qualities of man in the abstract or from some formula of right or justice. The first was abandoned after Kant. With respect to the second, Wundt has said justly:

⁴ Although he confuses the sociological conception of law with the conception of the historical school, Mr. Abbot's critique of sociological jurisprudence assumes the conventional interpretation of legal history. *Justice and the Modern Law*, 8-13. When some historian writes the history of juristic and judicial lawmaking viewed as social functions, it will be easy to vouch history for the other side. See my paper, *Legislation as a Social Function*, 18 *American Journal of Sociology* 755.

⁵ Brown, *The Underlying Principles of Modern Legislation*, chs. 7-8; Abbot, *Justice and the Modern Law*, ch. 1; Spencer, *Justice*, chs. 9-18. See also n. 1, p. 343.

"Man *in abstracto*, as assumed by philosophies of law, has never actually existed at any point in time or space."⁶

With respect to the third, we may note that, as such formulas of right and justice in the nineteenth century were individualistic, we got in this way a scheme of fundamental individual rights, — that is, individual interests which the law ought to secure, — above and beyond the reach of the state, which it was conceived the state could and must secure, but from which it was conceived the state could not derogate. The same conception was reached, indeed, by the second mode of treatment, that is, by deduction from the qualities of man in the abstract, because man in the abstract was conceived of as the individual man and not as the social man. Anglo-American juristic thinking has been especially insistent upon this conception of fundamental individual rights which, as natural rights, are quite above and beyond the reach of the state and to which social interests must yield.⁷

While it is true that the law recognizes individual interests but does not create them, it is quite as untrue that the law exists primarily in order to secure them or that state and law result simply from the pressure of such interests. As social institutions, state and law exist for social ends, and from the beginning have recognized and secured individual interests as a means thereto.

"The moral criterion by which to try social institutions and political measures may be summed up as follows: The test is whether a given custom or law sets free individual capacities in such a way as to make them available for the development of the general happiness or the common good. The formula states the test with the emphasis falling upon the side of the individual. It may be stated from the side of associated life, as follows: The test is whether the general, the public, organization and order, are promoted in such a way as to equalize opportunity for all."⁸

⁶ Ethics (trans. by Titchener and others), III, 160.

⁷ Blackstone, Commentaries, I, 129 ff., especially 139; *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798); *Fletcher v. Peck*, 6 Cranch (U. S.) 87 (1810); *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 662 (1874); *Butchers' Union, etc. Co. v. Crescent City, etc. Co.*, 111 U. S. 746, 762 (1884); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 237 (1897); *Wynhamer v. People*, 13 N. Y. 378, 387 (1856); *Matter of Jacobs*, 98 N. Y. 98 (1885); *People v. Marcus*, 185 N. Y. 257 (1906); *Beal v. Chase*, 31 Mich. 491 (1875); *In re House Bill 203*, 21 Col. 27, 39 Pac. 431 (1895); *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62 (1893). See Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, II, 160.

⁸ Dewey and Tufts, *Ethics*, 482-483.

It is important to remember that the progress of civilization has given rise to many of these individual interests and that the growth of law has made men conscious of them. For the growth of law and the growth of consciousness of individual interests have gone on together. Recognition of such interests is relatively late in the development of law. The first interests to be recognized are group interests. With economic development, individual interests gradually arise out of these and come to be recognized. In the Roman law, recognition of the individual human being as the subject of rights, or, in other words, as having individual interests which the law should secure, is a doctrine of the *ius naturale*.⁹ But even the Roman law of the classical period did not recognize private rights in the sense of our eighteenth- and nineteenth-century jurisprudence. This is especially true of the interest of substance or, as it is called, the natural right of property.¹⁰

In speaking of the administration of law by the British in India, Maine says:

"If I had to state what for the moment is the greatest change which has come over the people of India . . . I should say it was the growth on all sides of the sense of individual legal right; of a right, not for the total group, but for the particular member of it grieved, who has become conscious that he may call in the arm of the state to force his neighbors to obey the ascertainable rule."¹¹

Again, in speaking of the breaking up of village communities in India, he says:

"The probability, however, is that the causes have had their operation much hastened by the English, but have not been created by them. The sense of personal right, growing everywhere into greater strength, and the ambition which points to wider spheres of action than can be found within the community are both destructive of the authority of its internal rules."¹²

⁹ Dig. L, 17, 32; XXVIII, 1, 20, § 7; XXVIII, 8, 1; XLVIII, 10, 7.

¹⁰ Compare, for example, the ideas as to freedom of testamentary disposition in eighteenth- and nineteenth-century juristic thinking with the Roman law. Spencer, Justice, § 68; Miller, Philosophy of Law, 311; Miraglia, Comparative Legal Philosophy (Lisle's trans.), § 510; Beaussire, Les principes du droit, 265-271; Boistel, Philosophie du droit, I, § 270. See also Hegel, Grundlinien der Philosophie des Rechts, § 180 (Dyde's trans., 184).

¹¹ Village Communities, 7 ed., 73.

¹² *Id.*, 112.

Accordingly he tells us that partition of inheritances is demanded to-day everywhere in India and that:

"the brethren of some one family are always wishing to have their shares separately."¹³

What Maine saw going on in India in his time, legal history shows us has gone on in all systems.¹⁴ Up to the end of the eighteenth century the whole course of development of the law had been to disentangle individual interests from group interests and to protect and secure these individual interests by legal rights.

We may say, then, that the law slowly worked out a conception of private rights as distinguished from group rights. This culminated in the eighteenth century in a working out of individual interests as distinguished from public interests, to which our bills of rights, in which the natural rights of the individual are solemnly asserted against the state, still bear witness.¹⁵ Next the law began to work out social interests as such and to endeavor to reach a balance between individual interests and social interests. But there is a social interest in the individual moral and social life. In securing individual interests to this end, the law is securing a social interest. Therefore the problem ultimately is not to balance individual interests and social interests, but to balance this social interest with other social interests and to weigh how far securing this or that individual interest is a suitable means of achieving the result which such a balancing demands.

Individual interests may be classified as (a) interests of personality, — the individual physical and spiritual existence; (b) domestic interests, — "the expanded individual life;"¹⁶ and (c) interests of substance, — the individual economic life.

All classifications are more or less arbitrary, and the foregoing also may seem to be of that character. For instance, defamation infringes both personality and substance, since one's reputation is an asset as well as a part of his personality. Indeed Spencer, in his discussion of natural rights, includes reputation under incorporeal property.¹⁷ Again, malicious prosecution of a civil

¹³ Village Communities, 7 ed., 113.

¹⁴ See *post*, p. 356.

¹⁵ See Declaration of Rights of Virginia (1776), art. 1; Déclaration des droits de l'homme et du citoyen (1789), art. 2; Déclaration des droits de l'homme et du citoyen (1793), art. 1.

¹⁶ Paulsen, *Ethics* (Thilly's trans.), 634.

¹⁷ Justice, § 62.

action may infringe both personality and substance. Again, the common-law action for seduction is in form based on an injury to substance, not on an injury to a domestic interest. In fact, in the common-law system, injuries to domestic relations generally are in form viewed as infringements of interests of substance. But this is due to historical reasons. Along with so many other anomalies of our law, it arose from the exigencies of the action on the case, which was the only available remedy at common law. In consequence not only is this mode of viewing such injuries unjustifiable analytically, but it is largely disappearing in the modern law of torts. With the general development of law the lines between these interests are clearing and it is becoming apparent that the remedy must be applied with reference not to the act, but to the exact interest or interests which that act infringes.

Many German jurists put domestic interests under interests of personality.¹⁸ Some of them put all individual interests in the first group,—that is, they regard all individual interests as interests of personality.¹⁹ The threefold distinction suggested above was made by Kant. He distinguished natural rights as (a) personal, that is, involving the physical person; (b) personal but real in kind, that is, having a certain relation to substance also; and (c) real, that is, involving the relations of individuals to things.²⁰ Hegel criticizes this classification, arguing that all individual interests are interests of personality because, as he holds, all natural rights flow from the principle of respect for the free will of others.²¹ The central position of the free will in all legal philosophy in the nineteenth century led to a general acceptance of this view, and the indirect influence of the socialist jurists in Europe, who object to individual interests of substance, has kept it alive in the attempt to include as much as possible in what is taken to be an unimpeachable interest of personality. In the best recent discussion of the matter Adler prefers to confine the interest of personality to the physical person and the so-called spiritual person.²²

¹⁸ E. g., Lasson, *System der Rechtsphilosophie*, § 48, par. 6.

¹⁹ Gareis, *Science of Law* (Kocourek's trans.), 122-135; Gierke, *Deutsches Privatrecht*, I, 702.

²⁰ *Metaphysische Anfangsgründe der Rechtslehre*, §§ 11, 18, 24.

²¹ *Grundlinien der Philosophie des Rechts*, § 40, n.

²² *Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch*, *Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches*, 165.

3. PERSONALITY²³

How shall we arrive at the interests of personality which the law ought to secure? To put it as the question would have been put formerly, How shall we construct a scheme of natural rights of personality? It has been said that the usual method has been to deduce them from the qualities of man in the abstract or from some supposed formula of right and justice. The latter was the method of the nineteenth century. A sketch of what may be taken as a fair example of a nineteenth-century scheme of natural rights will illustrate this method. The scheme in question is to be found in Spencer's *Justice*. Although it purports to be based upon principles of evolution, it starts from what is essentially Kant's formula of right, taken as a formula of justice,²⁴ and from this formula deduces seven rights.²⁵ Each right is then confirmed by seeking to show that in the evolution of society and of law it has been recognized in continually increasing measure, and that the tendency is to recognize it to the full extent of the principle reached by deduction. Although the terminology is positivist, the mode of procedure is in substance a combination of the metaphysical and the historical methods as theretofore employed. First the right is deduced from the principle. The scheme of rights is shown to be a logical development of the formula of justice. Then it is shown that the rights recognized among civilized peoples represent an unfolding of the same principle in the same way in human experience. Considering simply the philosophical side, the scheme of seven natural rights is as follows:

(1) The right to physical integrity. Spencer deduces this from his definition of justice in this way: If the actions of one person are carried so far as directly to inflict physical injury upon another, they go beyond the limitation of his liberty by the like

²³ Gareis, *Science of Law* (Kocourek's trans.), 122-135; Adler, *Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch, Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches*; Geyer, *Geschichte und System der Rechtsphilosophie*, 137-142; Stahl, *Philosophie des Rechts*, 5 ed., 312-350.

²⁴ See Maitland, *Collected Essays*, II, 274-284; Spencer, *Justice*, app. A.

²⁵ Spencer, *Justice*, chs. 9-18. I have abridged the scheme somewhat by putting the ten rights which Spencer enumerates into seven, without, however, altering the substance, as he himself states that some of the rights he discusses are but phases of others.

liberties of all; they are, therefore, unjust and may be the subject of legal interference. It should be noted that in his view this interference with the individual has to be justified because it is interference with a fundamental natural right. It is held to be justified in this case by consideration of the like natural rights of other individuals. In this way Spencer deduces the natural right of each individual to have his physical integrity respected by his fellows.

(2) The right to free motion and locomotion, or, as it is usually called by writers on the common law, the right of personal liberty. Here, it is said, an obvious deduction from the formula of justice, — "the liberty of each limited only by the like liberties of all," — requires that each individual be at liberty to make free use of his limbs and to move about freely from place to place, except as by such conduct he interferes with like action on the part of his fellow men or with some other natural right of his fellow men.

(3) The right to the use of natural media. This is deduced as follows: If one individual interferes with the relations of another to the physical environment upon which the latter's life depends, he infringes the like liberties of others by which his own are measured. This so-called natural right to the use of natural media is a curious example of the extreme individualism of nineteenth-century philosophical jurisprudence. It is true that in all systems of law some things are held to be incapable of ownership by individuals. It is usually said of such things in the law books that they are "common to all mankind" and that their appropriation by individuals is forbidden by natural law. Thus, the Institutes of Justinian say:

"By the law of nature . . . the following things are common to all men: air, running water, the sea, and consequently the shore of the sea." ²⁶

Again, an eighteenth-century writer says:

"Some things are by nature incapable of appropriation, so that they cannot be brought under the power of any one. These got the name of *res communes* by the Roman law and were defined things the property of which belongs to no person but the use to all. Thus the light, the air, running water, and so forth are so adapted to the common use

²⁶ Inst. II, I, § 1.

of mankind that no individual can acquire a property in them or deprive others of their use."²⁷

It will be observed that down to the nineteenth century, jurists had said that natural law decreed a common interest in natural media and forbade any separate individual interest. Here, however, we find a philosopher in the nineteenth century insisting on an individual natural right to the use of these media which precludes individual ownership. It is interesting to note that recently a third doctrine has grown up, namely, that there is a public interest in these natural media so that they are not *res communes* but *res publicæ*.²⁸ Perhaps nothing could illustrate more clearly the purely personal character of all such schemes of natural rights.²⁹

(4) The right of property. The mode in which this is deduced must be considered more fully elsewhere.³⁰ Under this right

²⁷ Erskine, *Institute of the Law of Scotland*, I, 146.

²⁸ See the statutes in Wiel, *Water Rights*, 3 ed., I, §§ 6, 120; *Ex parte Bailey*, 155 Cal. 472, 101 Pac. 401 (1909); *Geer v. Connecticut*, 161 U. S. 519 (1896).

²⁹ Thus: "No court would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C. and B. the wife of D." *Miller, J.*, in *Loan Ass'n v. Topeka*, 20 Wall. 655, 662 (1874). But Lord Holt, who agreed that there are limitations on legislative authority imposed by natural law says that parliament "may make the wife of A. to be the wife of B." *City of London v. Wood*, 12 Mod. 669 (1692). Mr. Justice Miller wrote when legislative divorce had become obsolete almost everywhere. In Lord Holt's time a divorce *a vinculo* could be had only in parliament. See also the statement of Curtis, J., in *Scott v. Sandford*, 19 How. (U. S.) 393, 626 (1856), that "all writers" agree that slavery "is created only by municipal law." But Aristotle (*Politics*, bk. I, ch. 5), Grotius (II, 5, 27, § 2 and 29, § 2), and Rutherford (*Natural Law*, bk. I, ch. 20, § 4), who are not insignificant authorities, argue that slavery has a natural basis in some cases beyond and apart from law. Again, in *Wynhamer v. People*, *supra*, 454, Hubbard, J., said: "Liquor is not a nuisance *per se*, nor can it be made so by a simple legislative declaration." Since that time people have changed their minds, and we find another judge saying: "The entire scheme of prohibition as embodied in the Constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use or as a beverage were recognized. Such a right does not inhere in citizenship." *Harlan, J.*, in *Mugler v. Kansas*, 123 U. S. 623 (1887).

"We think that, aside from the positive law, there exist only the opinions of authors, which respond more or less to the needs of society." Antoine, *Introduction to Fiore, Nouveau droit international public*, ii. Cf. Bentham, *Principles of Morals and Legislation*, 17, n. 1.

³⁰ See Ely, *Property and Contract in their Relation to the Distribution of Wealth*, ch. 22.

Spencer includes (a) tangible or corporeal property; (b) incorporeal property, under which, curiously enough, he includes reputation as the result of a man's good conduct, along with patent and copyright; and (c) the right of gift and bequest, which he regards as consequences of complete ownership. The inclusion of reputation under incorporeal property appears to illustrate the effect of propinquity upon philosophical ideas. For it must be admitted that for many purposes English law does base its law of defamation on an interest of substance rather than on an interest of personality. The basis of the "right of bequest" or testamentary disposition must also be considered more fully elsewhere.³¹

(5) The right of free exchange and free contract. This is deduced as a sort of freedom of economic motion and locomotion in the same manner as the right of physical motion and locomotion.

(6) The right of free industry. This is said to be a modern outgrowth of the right of free motion and locomotion, being, as it were, a right of economic motion and locomotion.

(7) The right of free belief and opinion. This also is said to be a modern development of the right of free motion and locomotion. It is deduced as a right of free mental motion, a right of exercising complete freedom in one's mental movements so far as like freedom on the part of others is not affected thereby. Two phases of this right are treated as two separate rights, namely, freedom of religious belief and opinion and freedom of political belief and opinion.

If we reject the mode of determining individual natural rights illustrated by the foregoing scheme, as I think we must, how are we to define the individual interests which the law ought to secure? The pragmatist would answer that we should take for our starting point the proposition of William James which I have discussed elsewhere in this connection,³² namely, that all demands which the individual may make are to be met so far as they are not outweighed by other demands of (a) other individuals, (b) the organized public, (c) society. The principles by which we are to

³¹ See Ely, *Property and Contract in their Relation to the Distribution of Wealth*, ch. 17.

³² *The Philosophy of Law in America*, *Archiv für Rechts- und Wirtschaftsphilosophie*, VII, 213; *Legislation as a Social Function*, 18 *American Journal of Sociology* 755.

determine how far they are so outweighed must be considered elsewhere.³³ Some have preferred to say that all "reasonable demands" are to be met so far as possible.³⁴ Reason requires limitation of the demands of each with reference to those of others and of all, and sometimes, it may be, limitation of the demands of society with reference to those of individuals. But why? Because all cannot be satisfied. If our aim is to satisfy all so far as we can, then reason is employed in the selection of those which we will satisfy and of the limits within which we shall satisfy them. Accordingly the first task is simply to ascertain what demands the individual conceivably may make as incident to personality. It will be convenient to take these up under three heads, namely, the physical person, honor (reputation), and belief and opinion.

4. THE PHYSICAL PERSON³⁵

Inviolability of the physical person is universally put first among the demands which the individual may make. This interest, called by Paulsen the interest in body and life,³⁶ includes the so-called natural rights of physical integrity and of personal liberty or, as Spencer styles it, free motion and locomotion. Passing for the moment all consideration of the limits within which this interest must be confined when recognized, three questions may be taken up: (1) What is the extent of the interest as an individual interest; that is, what may the individual demand in this connection which, therefore, the law is to secure so far as may be? (2) How far has this interest been recognized by legal systems in the past and how has legal recognition of this interest developed? (3) How far is this interest protected by law to-day?

We may conceive the interest in the physical person as cover-

³³ See my paper, *Legislation as a Social Function*, 18 *American Journal of Sociology* 755.

³⁴ *Centralization and the Law*, 154. See Willoughby, *Social Justice*, 20 ff.

³⁵ Green, *Principles of Political Obligation*, §§ 148-151; Wigmore, *Summary of the Principles of Torts* (Cases on Torts, II, app. A), §§ 12-26; Miller, *Philosophy of Law*, lect. XI; Amos, *Systematic view of the Science of Jurisprudence*, 287-297; Post, *Ethnologische Jurisprudenz*, II, § 102; Blackstone, *Commentaries*, II, 119-138. I am indebted to Professor E. R. Thayer for assistance and for many suggestions in connection with this section.

³⁶ *Ethics* (Thilly's trans.), 633.

ing five points. The first and most obvious is immunity of the body from direct or indirect injury. Second and closely related is the preservation and furtherance of bodily health. Third and hardly less important is immunity of the will from coercion, freedom of choice, and judgment as to what one will do. These three interests have long been recognized. Two more have become important with the progress of civilization, namely, immunity of the mind and the nervous system from direct or indirect injury and the preservation and furtherance of mental health,—freedom from annoyance which interferes with mental poise and comfort. Perhaps it may be objected that we have no warrant for thus distinguishing mental health and the security of the nervous system from bodily health and the security of bone and muscle. But history and certain practical considerations require that these be considered apart, whatever a stricter abstract adherence to biological science might otherwise dictate.³⁷

Injuries to the body are the first wrongs dealt with in the history of law. But they are not thought of at first as infringements of an individual interest. Rather they are thought of as involving infringement of an interest of a group or kindred or of a social interest in peace and good order. They are taken to involve affront to the kindred whose kinsman is assailed, or it is taken that a desire for revenge will be awakened, and hence that they involve danger of private vengeance and private war.³⁸ It is not an individual interest which is regarded, but a group interest. Hence the remedy (composition) is imposed to secure the social interest in peace and order, not to vindicate an individual private right. Often in primitive law a composition is payable to the kindred as well as to the person injured. Likewise in case of killing, the *wer* is payable to the kindred, not to dependents; it is exacted to satisfy vengeance for an insult to the kindred, not to compensate those who are deprived of support.³⁹ At first, then, the ideas are (1) a group interest against insult and (2) a social interest against disorder, rather than an individual interest in the physical person.

³⁷ On the other hand, for like reasons, the common law deals with nervous injuries which leave no physical signs and mental injury without much discrimination. *Spade v. Railroad Co.*, 168 Mass. 285, 47 N. E. 88 (1897).

³⁸ The latter idea is perhaps still behind the common law of libel as a misdemeanor. Blackstone, Commentaries, IV, 150.

³⁹ See Amira, *Grundriss des germanischen Rechts*, § 54.

Out of these evolves slowly the idea of an individual interest secured by an individual right.

Again, when the individual interest is recognized, it is regarded at first as an interest in one's honor, in one's standing among brave men regardful of their honor, rather than as an interest in the integrity of the physical person. In Greek law every infringement of the personality of another is *ὑβρις* (*contumelia*); the injury to honor, the insult, being the essential point, not the injury to the body.⁴⁰ In Roman law, injury to the person is called *iniuria*, meaning originally insult, but coming to mean any willful disregard of another's personality.⁴¹ In consequence the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of the injury to honor and the extent of the desire for vengeance thus aroused,⁴² since the interest secured is really the social interest in preserving the peace.

While the law secures the interest of the individual in his honor at least as soon as his interest in his physical person, when presently it distinguishes between injuries to the person and injuries to honor or reputation, it moves very slowly in protecting feelings in any respect other than against insult or dishonor. Three steps may be noted. At first only physical injury is considered. Later overcoming the will is held a legal wrong; in other words, an individual interest in free exercise of the will is recognized and secured. Finally the law begins to take account of purely subjective mental injuries to a certain extent and even to regard infringement of another's sensibilities.

With respect to the interest in free exercise of the will, the Roman law of the stage of strict law (*ius civile*) and the common law agreed in holding transactions entered into under duress to be legally binding.⁴³ In each system in the stage of infusion of morals into law, equity intervened to set aside legal transactions resulting from coercion. Roman law went further. On equitable grounds it worked out a special wrong (*metus*) of unlawfully overcoming another's will and developed an action for reparation of

⁴⁰ Hermann, *Lehrbuch der griechischen Rechtsaltertümer*, 4 ed., § 6.

⁴¹ Gaius, III, §§ 220-222; Inst. IV, 4; Dig. XLVII, 10, 16.

⁴² See my paper, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 198.

⁴³ *Id.*, 204.

the injury resulting therefrom.⁴⁴ The common law did not recognize a tort of duress as such, not even to the extent of allowing recovery by way of reparation for what one did through coercion as an incident of recovery for the physical injury with which it was connected. But recovery by way of restitution came to be allowed on equitable principles as upon quasi-contract in order to prevent unjust enrichment.⁴⁵ The law on this point grew slowly. In the Roman and the modern Roman law it seems to have passed through four stages. In the first three stages there is a purely objective standard. The law does not ask whether this man's will was in fact overcome by wrongful pressure brought to bear upon him in this case, but asks instead what was the character of the pressure employed. In the first stage the objective standard made use of is peril of life or limb, — actual or threatened bodily suffering. Any pressure short of that is not regarded.⁴⁶ In the second stage there is still an objective test, but it is more liberal. The law asks whether the will of a reasonable or standard man would have been overcome by the pressure employed.⁴⁷ In the third stage there is a further liberalizing of the objective standard. The law asks whether the evil threatened was a serious one or, as some civilians put it, whether the complainant yielded to fear of "a not-inconsiderable evil."⁴⁸ Finally the new German code adopts a purely subjective standard, asking only, Did the unlawful pressure employed in this case actually overcome the will? ⁴⁹ It is required that the pressure be unlawful because if,

⁴⁴ Dig. IV, 2, 1; IV, 2, 14, §§ 3, 5; IV, 2, 16, § 2.

⁴⁵ *Astley v. Reynolds*, 2 Stra. 915 (1782).

⁴⁶ Dig. IV, 2, 2; IV, 2, 3; Code, II, 4, 13. By way of comparison it may be noted that Blackstone so defines duress in our law, laying down that there must be threat of immediate harm to life or limb or else imprisonment. Commentaries, I, 130-131.

⁴⁷ Dig. IV, 2, 6.

⁴⁸ Dig. IV, 2, 5; Windscheid, Pandekten, I, § 80, n. 6; Dernburg, Pandekten, I, § 91, par. 2; Regelsberger, Pandekten, I, § 144, n. 8.

⁴⁹ Civil Code, § 123; Crome, System des deutschen bürgerlichen Rechts, I, 432. It should be noted that Anglo-American law is going through a similar course of development. Blackstone's formula, which is that of the first stage of the Roman law, has been cited *supra*. In the nineteenth century the cases commonly apply the objective test of what is "sufficient to overcome the mind and will of a person of ordinary firmness." *Brown v. Pierce*, 7 Wall. (U. S.) 205 (1868); *James v. Dalbey*, 107 Ia. 463, 78 N. W. 51 (1899); *Railroad Co. v. Pattison*, 41 Ind. 312, 320 (1872); *Fellows v. School District*, 39 Me. 559 (1855); *Tapley v. Tapley*, 10 Minn. 448 (1865); *Davis v. Railroad Co.*, 46 Miss. 552, 568 (1872); *Edwards v. Bowden*, 107 N. C.

to secure some other interest, the law recognizes the pressure as legal, then, in a weighing of interests the individual interest in freedom of will may have to give way.⁵⁰ As to the main point, it would seem that the subjective standard is the one that ought to be adopted. So far as the objective standard subserves a useful purpose in preventing fraud and so maintaining the social interest in security of transactions, the end may be attained by requiring a proper *quantum* of proof in such cases and by treating considerations of what a reasonable man would do as of evidentiary value. The objective standard is a survival from the extreme individualism of the strict law and its reluctance to set aside acts done in due legal form.

Injury to the nervous system, mental injury, and injury to sensibilities, where there is no physical impact or no injury to substance or to any relation, is a new problem of modern law. Here also development has been slow and cautious, partly because the law on this subject has had to be made in a period of legal stability, but partly also because of practical limitations upon the enforcement of legal rules and hence upon the securing of interests thereby. A nervous derangement manifested objectively is like any bodily illness. But our law does not protect against purely subjective mental suffering except as it accompanies or is incident to some other form of injury and within certain disputed limits.⁵¹ There are obvious difficulties of proof in such

58, 12 S. E. 58 (1890). But courts frequently define duress in terms of the subjective criterion. *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587 (1891); *Phillips v. Henry*, 160 Pa. St. 24, 28 Atl. 477 (1894); *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495 (1900). In actual application the tendency seems to be toward the subjective criterion.

⁵⁰ *E. g.*, a threat to sue or to levy execution where one has a right to do so in order to secure an interest of substance, although results disastrous to the debtor would follow. *Emmons v. Scudder*, 115 Mass. 367 (1874). *Cf.* Dig. IV, 2, 3.

⁵¹ "A factor which we may for the sake of convenience refer to as the parasitic element of damage. The idea which is meant to be brought out by the use of this expression is that in certain situations the law permits elements of harm to be considered in assessing the recoverable damage which cannot be taken into account in determining the primary question of liability. It is only under this head that such factors as insult, disgrace, and anguish of feeling can get legal recognition at all." Street, *Foundations of Legal Liability*, I, 461. A striking instance may be seen in *Floyd v. Atlantic Coast Line R. Co.*, 83 S. E. 12 (N. C., 1914), where a mother sued for mental anguish caused by the negligent mutilation of the dead body of her boy. As the right to possession of the body for the purposes of burial was in her husband

cases, so that false testimony as to mental suffering may be adduced easily and is very hard to detect.⁵² Hence this individual interest has to be balanced carefully with a social interest against the use of the law to further imposture. For these reasons courts, thinking more of the practical problem of proof than of the logical situation, have looked to see whether there has been some bodily impact or some wrong infringing some other interest, which is objectively demonstrable, and have put nervous injuries which leave no physical record and purely mental injuries in the same category.⁵³ In case of nervous injury or mental suffering along with other injury as a result of bodily impact, considerations of what would naturally happen to persons of normal sensibilities enable the law to meet the practical difficulties. This is true also where there has been an infringement of some other interest in itself raising a right of action.⁵⁴ But if there is no physical impact and there is no independent right of action for a coincident injury, the practical difficulties weigh heavily. The case which best illustrates the problem is one in which fright or nervous shock results in or develops into palpable physical injury. In one type of this case the fright or nervous shock was caused by the defendant's negligence. Attempt has been made to dispose of the question by resorting solely to the principle of remoteness.⁵⁵

as next of kin, and hence there was no infringement of any interest of the mother other than that involved in the injury to feelings and sensibilities, recovery was denied.

⁵² Cf. the remarks of the court in *Huston v. Freemansburg*, 212 Pa. St. 548, 61 Atl. 1022 (1905).

⁵³ *Spade v. Railroad Co.*, 168 Mass. 285, 47 N. E. 88 (1897); *Dulieu v. White*, [1901] 2 K. B. 669. But see *Yates v. South Kirkby Collieries, Ltd.*, [1910] 2 K. B. 538.

⁵⁴ *Bouillon v. Laclede Gas Light Co.*, 148 Mo. App. 462, 129 S. W. 401 (1910); *Tennessee Cent. R. Co. v. Brasher*, 97 S. W. 349 (Ky., 1906); *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436 (1913). "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law." Street, *Foundations of Legal Liability*, I, 470.

⁵⁵ *Victorian Railway Com'rs v. Coultas*, 13 App. Cas. 222 (1888) (no recovery); *Green v. Shoemaker*, 111 Md. 69, 73 Atl. 688 (1909) (recovery allowed). See Wigmore, *Summary of the Principles of Torts*, § 15. "Do not some courts, in laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?" Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103. In other words, questions of "legal cause" or "remoteness" are often used

But the better decisions among those which deny recovery proceed frankly upon considerations of what is practicable, that is, upon a balancing of interests.⁵⁶ In another type of this case the nervous or mental shock which caused the physical injury was inflicted intentionally. Here the difficulties are less than in the first type and the better judicial view allows recovery.⁵⁷ But there are courts that will not go so far and there are limits. If the defendant intended to bring about the physical harm which followed, there would seem no occasion for requiring more.⁵⁸ If, however, the defendant did not intend the physical harm, but only a mild fright or mild nervous shock which would work no further harm in a person of ordinary nerves and normal sensibilities, the accepted rule seems to be that there should be no recovery.⁵⁹ In cases of negligence the individual interest of the actor, — that is, his interest in the free exercise of his faculties, — must be weighed as well as the social interest against imposture and the practical difficulties of proof and reparation. Where he exercises his facul-

by the courts subconsciously to cover a balancing of other interests against the individual interest.

⁵⁶ "As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable that prevents a recovery for visible illness resulting from nervous shock alone. . . . But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." Holmes, C. J., in *Homans v. Boston E. R. Co.*, 180 Mass. 456, 62 N. E. 737 (1902). In a prior case the same judge said: "The point . . . is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles on purely practical grounds." *Smith v. Postal T. Co.*, 174 Mass. 576, 55 N. E. 380 (1899). Cf. also *Driscoll v. Gaffey*, 207 Mass. 102, 92 N. E. 1010 (1910). But see *Green v. Shoemaker*, *supra*, where the court denies that these practical considerations are sufficient to preclude recovery where physical injury has resulted from fright, though it says no action will lie for mere fright which does not result in a physical injury.

⁵⁷ *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Garrison v. Sun Pub. Co.*, 207 N. Y. 1, 100 N. E. 430 (1912). But see *Stevens v. Steadman*, 140 Ga. 680, 79 S. E. 564 (1913).

⁵⁸ See remarks of Holmes, C. J., in *Silsbee v. Webber*, 171 Mass. 378, 380, 50 N. E. 555, 556 (1898).

⁵⁹ *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335 (1899). See Bohlen, *Right to Recover for Injury Resulting from Negligence without Impact*, 41 Amer. L. Reg.

ties for purposes recognized by law and, so far as he could reasonably foresee, does nothing that would work an injury, the individual interest of the unduly sensitive or abnormally nervous must give way. But the law does not secure individuals in the free exercise of their faculties for the purpose of injuring others, since obvious social interests are opposed to such a claim. Hence, if there was an intention to injure, only the social interest against imposture and the practical difficulties are to be weighed. This is the philosophical basis of the distinction made in these cases. Probably advance in our knowledge of psychology and mental pathology and progress in means of arriving at the truth in matters where expert evidence is required will determine the development of the law upon this subject. So long as the margin for imposture and the scope of pure expert conjecture remain as large as they are at present, this phase of the interest of personality must remain in some measure insufficiently secured.

Where the injury is to mental comfort only, the practical difficulties are still greater. Hence the law can recognize an "interest in the peace and comfort of one's thoughts and emotions"⁶⁰ only to a limited extent. In the first place, an objective standard is required here by the social interest with which the individual interest must be balanced. Hence the tendency of the law to secure an interest in mental comfort only to the extent of ordinary sensibilities of ordinary men, and then only when the mental suffering is caused by and involved in the infringement of some other interest.⁶¹ In other words, here again the law does not secure the whole demand which the individual may make, but it does secure the interest in case of ordinary sensibilities where there is also an objective injury. Thus, no doubt, it secures the interest in the general run of cases for the average man. No more may well be attempted with our present means of proof and in view of the inapplicability to such injuries of the means of redress known to our law.

Another phase of the same interest is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. Such an interest is the basis of the disputed legal right of privacy.⁶² It is

⁶⁰ Wigmore, Summary of the Principles of Torts, § 19.

⁶¹ *Id.*, § 20.

⁶² Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193.

a modern demand, growing out of the conditions of life in the crowded communities of to-day, and presents difficult problems. The interest is clear. Such publicity with respect to private matters of purely personal concern is an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering much more acute than that produced by a mere bodily injury. But, as the injury is mental and subjective, the difficulties already considered must, at least, confine legal securing of the interest to ordinary sensibilities. Here, as in many other cases, in a weighing of interests the over-sensitive must give way. For over and above the difficulties in mode of proof and in applying legal redress, social interests in free speech and dissemination of news have also to be considered. On such grounds, no doubt, a legal right of privacy which fully secures this interest has not been recognized anywhere.⁶³ For the most part the interest has been secured incidentally, as it were, by taking account of infringement thereof as an element of damage where well-recognized legal rights have also been violated, rather than by establishing a legal right of privacy a violation whereof should constitute a cause of action. But while the law is slow in recognizing this interest as something to be secured in and of itself, it would seem that the aggressions of a type of unscrupulous journalism, the invasions of privacy by reporters in competition for a "story," the activities of photographers, and the temptation to advertisers to sacrifice private feelings to their individual gain call upon the law to do more in the attempt to secure this interest than merely take incidental account of infringements of it.⁶⁴ A man's feelings are as much a part of his personality as his

⁶³ See Wigmore, Summary of the Principles of Torts, § 149.

⁶⁴ "John S. Geraghty, *father* of John Edward Paul Geraghty, who on Tuesday eloped with Miss Julia French, to-day asked the police to save him from camera men. . . . Geraghty told the police that he was followed everywhere by men with cameras who were trying to take the picture of himself and his cab. He said he had been driven about crazy by them and that his wife and children were being hounded in a similar way. Mr. Geraghty was very angry this afternoon and he loaded up the front seat of his cab with several large stones which, he said, the first man who tried to snap his picture would get. Mr. Geraghty is usually a peaceful, law-abiding citizen, but there arrived here to-day a number of men to get his picture, and he seriously resents being followed." Press dispatch of August 12, 1911, quoted in Wigmore, Cases on Torts, II, 960-961. Cf. *Binns v. The Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913).

limbs.⁶⁵ The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth. The problems are rather to devise suitable redress and to limit the right in view of other interests involved.

The interest in body and life is not only the first to receive the protection of law, but it is on the whole the interest with respect to which individual demands are most insistent and the social interest in securing them is strongest. Yet the law, as has been seen, does not cover the whole field of this interest. It does not secure all the demands with respect to physical and mental integrity which the individual may make. The reasons are of two kinds. On the one hand they are historical, growing out of the mode in which the law upon this subject has developed, and in particular out of the procedure and the remedies worked out to give effect thereto. For example, a large part of the backwardness of the common law as to immunity of the mind and of the nervous system from injury is due to the exigencies of our mode of trial by jury and to our remedy of damages. Such a remedy as that afforded by the action for honorable amends⁶⁶ in the civil law and resort to specific relief where possible, as is done in continental Europe,⁶⁷ would enable the legal system to extend the scope of its protection of this interest. But the most effective remedy in this connection is prevention. The backwardness of preventive justice in American law is a grave defect.⁶⁸ In connection with interests of personality, where redress by way of damages is often obviously inadequate if not inapplicable, the hesitation of our law to apply preventive remedies is unfortunate and without just excuse.⁶⁹

⁶⁵ Some think of the right of privacy as a "property right," that is, they consider that an interest of substance is involved. *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911). But see *Riddle v. MacFadden*, 201 N. Y. 215, 94 N. E. 644 (1911).

⁶⁶ See De Villiers, *The Roman and Roman Dutch Law of Injuries*, 177 ff.

⁶⁷ Garraud, *Droit pénal français*, II, §§ 459-461; IV, §§ 1324 ff.

⁶⁸ See my paper, *A Practical Program of Procedural Reform*, 22 Green Bag 455.

⁶⁹ "There is no reason in the nature of things why equity should not interfere to prevent injury to feelings. Pecuniary damages cannot be proved, and the temptation to purely speculative litigation is therefore absent. Such being the case, if a plaintiff feels himself so much aggrieved by threatened or continued acts of the defendant as to lead him to incur the expense and annoyance of an actual litigation, we may be certain that he regards the injury as substantial. If under these circumstances he

A second type of reasons for the failure of the law to secure fully individual interests of personality are practical, growing out of the practical limitations involved in the administration of justice according to law. Next to property in corporeal things, the interest in body and life is on the whole the interest most completely capable of legal protection. But the practical limitations are considerable. In the first place, with respect to merely mental injuries, the danger of imposture, the difficulty, if not impossibility, of satisfactory proof, and the difficulty of devising adequate redress stand in the way of complete securing by law of an interest which the law is quite willing to recognize fully. Again, account must be taken of the relative triviality of injuries, looked at in gross, which may nevertheless have a real importance in the case of particular individuals. The necessity of acting with reference to the average case, involved in any system of standards or rules, compels some sacrifice of the demands of the over-sensitive. Finally, the intangible nature of many injuries to personality, the difficulty of tracing them to their source and of fitting cause to effect, must also be taken into account.

[*To be concluded*]

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can, in fact, prove that continued injury to his feelings is threatened or continued, and the defendant can offer no rational excuse for continuing it, equity has no rational excuse to offer for denying the easy aid of its injunctive process." Abbot, *Justice and the Modern Law*, 32.

CONSTRUCTIVE TRUSTS BASED ON PROMISES MADE TO SECURE BEQUESTS, DEVISES, OR INTESTATE SUCCESSION

[Continued]

B. THE AUTHORITIES

WHERE the existence of unattested directions by testator is not communicated to the legatee or devisee in the testator's lifetime. — It is perfectly clear that where a legatee or devisee takes by the terms of the will absolutely, but a document not attested as a will, and not incorporated into the will, is found with the will, or in some other way is brought to the attention of the legatee or devisee for the first time after the testator's death, and discloses the intention of the testator that the devisee or legatee should not hold absolutely but in trust, chancery will not make the legatee or devisee hold as trustee.⁵⁶ "Such a memorandum may or may not influence him as a man of honor, but no legal effect can be given to it."⁵⁷ The legatee or devisee could not be made to hold in trust

⁵⁶ Schultz's Appeal, 80 Pa. St. 396 (1876); *Juniper v. Batchelor*, [1868] W. N. 197; *Ames*, Cases on Trusts, 2 ed., 189. See *Scott v. Brownrigg*, 9 L. R. Ir. 246 (1881); *In re Boyes*, L. R. 26 Ch. D. 531 (1884); *Bryan v. Bigelow*, 77 Conn. 604, 60 Atl. 266 (1905). Cf. *Hodnett's Estate*, 154 Pa. St. 485, 26 Atl. 623 (1893); *Flood v. Ryan*, 220 Pa. St. 450, 69 Atl. 908 (1908).

But in *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614 (1892), where a bequest was made to a stranger with intent on the testator's part to evade the state bastardy statute by having the stranger hold for testator's mistress and bastard children more property than the statute permitted him to give them as against his wife and lawful children, it was held that the stranger must hold in trust for the wife and lawful children, despite the fact that he was not informed before testator's death of any secret trust attached to the bequest. Pope, J., for the court, said of the legatee (p. 550):

"If he should disregard this palpable intention of his benefactor, he would be lost to all shame. If he should regard it and execute it, he thus contravenes the positive laws of his country forbidding such a course. Under our view of the law, he shall not be required to elect either course."

Schultz's Appeal, *supra*, which is *contra*, seems a sounder decision. It allowed the legatee to keep free from any trust as he was "entirely innocent of any complicity in the fraud of the testator."

⁵⁷ Cozens-Hardy, L. J., in *In re Maddock*, [1902] 2 Ch. 220, 230. Cf. *Flood v. Ryan*, *supra*.

for the intended *cestui que trust*, because the statute governing wills makes it impossible to ascertain against the objection of the legatee or devisee, by competent evidence, who he is, since to let the document name him would be to give it, though unattested as required of wills, the effect of a will; and the legatee or devisee could not be held to be a trustee for the next of kin, residuary legatee, heir, or residuary devisee, without a finding that he was intended to be trustee, and the statute governing wills makes that finding impossible, against his objection, for want of competent evidence of such intent. Since he has taken in ignorance of the testator's intentions, and since those intentions have not been evidenced in the manner required by the statute about wills, chancery says that he may do as he pleases with the legacy or devise.⁵⁸

Where the legatee or devisee promises the testator to hold for or to pay or convey to others whose names are not communicated to him in the testator's lifetime. — It is also well settled that a legatee or devisee, who by the provisions of the will is to take absolutely, cannot be compelled to hold in trust for intended *cestuis que trust* merely because he promised the testator that he would hold for the benefit of persons to be named later by the testator. A document signed by the testator and containing the names of the persons and the terms of the secret trust, but not attested as a will and not communicated to the legatee or devisee in the testator's lifetime, cannot be enforced as a document without violating the statute governing wills.⁵⁹ But that does not mean that the legatee or devisee may hold for himself free from any trust. Since he agreed to take only as trustee, and thereby either induced the making of the devise or legacy to himself or, if the will containing it was already in existence at the time of the promise, secured its continuance without revocation or qualification, he cannot on principle be allowed to hold for

⁵⁸ In *In re Pitt Rivers*, [1902] 1 Ch. 403, Vaughan Williams, L. J., said (p. 407):

"It has been discussed very often what are the essentials which are necessary in order to induce the courts to give effect to a trust which has not been expressed in the way in which the Wills Act requires that testamentary intentions should be expressed. . . . I suppose one may state shortly and concisely that the court never gives the go-by, if I may use the expression, to the provisions of the Wills Act by enforcing upon any one testamentary intentions which have not been expressed in the shape and form required by that Act, except for the prevention of fraud. That is the only ground upon which it can be done."

⁵⁹ *In re Boyes*, *supra*. Cf. *McCormick v. Grogan*, L. R. 4 H. L. 82 (1869); *In re King's Estate*, L. R. 21 Ir. Ch. 273 (1888).

himself, for that would be unjust enrichment such as equity cannot properly tolerate. While chancery could make him hold for the intended *cestui que trust*, since chancery, if it wants to, can select as its constructive *cestui que trust* anyone who ought to fill that position, the chancellors have so far felt that to select the intended *cestui que trust* in this kind of a case would be to go contrary to the intent of the statute governing wills. Accordingly, in most jurisdictions, the legatee or devisee will be made to hold in trust for the next of kin, residuary legatee, heir, or residuary devisee.⁶⁰ In some jurisdictions, however, he will be allowed to keep for himself, if he did not solicit the legacy or devise, if he made his promise in good faith, and if his action is not in violation of a special confidential relationship.⁶¹ It would seem that since he is compelled to hold in trust for anybody only because he promised as he did, and because he cannot be allowed to be enriched by a breach of that promise, he should be allowed to hold for the intended *cestuis que trust* if he so prefers. This view does not ignore the policy of the statute regarding wills, but recognizes the truth that there can properly be no constructive trust at all if the legatee or devisee carries out the testator's wishes, for he is then not unjustly or at all enriched.⁶² It is quite sound to say that the legatee or de-

⁶⁰ *In re Boyes*, *supra*. Cf. *Thayer v. Wellington*, 9 Allen (Mass.) 283 (1864). Such a trust has usually been applied by testators to the whole estate, or to the residue, and hence there has been no chance for a residuary legatee to claim against the next of kin or for a residuary devisee to claim against the heir. The wording of the residuary clause, and the attitude of the given jurisdictions on lapsed and void legacies and devises, would be factors in determining any conflicting claims. That the residuary legatee or devisee must be reckoned with when a proper occasion arises is recognized in the sentence from Jarman on Wills, quoted in n. 91, *post*.

⁶¹ See cases in n. 68, *post*.

⁶² See n. 42, 43, and 45, *ante*. No court seems yet to have taken such advanced ground, but in reference to an analogous supposititious situation, — that of a devise expressly "in trust" but the trust not being stated in the will and not being communicated to the trustee in the testator's lifetime, — an English judge has recently stated that apart from authority he sees no reason why a trust for the intended *cestui que trust* should not be enforced if the testator communicated his intentions to some one. See Eve J., in *In re Gardom*, *Le Page v. Attorney-General*, [1914] 1 Ch. 662, 672-3. His statement in regard to that point will be found quoted in n. 90, *post*. The argument is that communication to the devisee is needed only to establish that he is to hold in trust for some one, a fact which in the expressly "in trust" cases the will itself establishes, and that communication by the testator to any one will serve to designate the *cestui que trust*, *i. e.*, to show "what the trust is." A letter of the testator to the devisee found among the testator's papers, as was the case in

visce cannot be forced to carry out the uncommunicated wishes of the testator not attested as required by the statute as to wills, since to force him to do so would be to give those uncommunicated wishes the operative effect of a will. But it would seem to be just as sound to say that he should be allowed to carry out those wishes if he wants to, since nothing but his refusal or neglect to carry them out would justify the enforcement of a constructive trust against him in favor of anybody.

Where the legatee or devisee promises the testator to hold for or to pay or convey to others whose names are communicated to him in the testator's lifetime and the promise induces the giving of the legacy or devise. — By the great weight of authority a constructive trust will be declared and enforced against a legatee or devisee, and in favor of the intended *cestui que trust*, if the testator gave the legacy or devise because of the legatee's or devisee's express or tacit promise to use the legacy or devise for the intended beneficiaries, provided the testator's intentions are legal and the names of the beneficiaries are communicated to the legatee or devisee by the testator in his lifetime.⁶³ The minority decisions are discussed under the second

In re Boyes, supra, would serve the same purpose. But in the absence of communication to him in the testator's lifetime, the devisee should not be compelled to hold in trust for the intended *cestui que trust*, but he should be permitted to hold for the intended *cestui que trust* if he desires to do so.

⁶³ *Drakeford v. Wilks*, 3 Atk. 539 (1747); *Thynn v. Thynn*, 1 Vern. 295 (1864); *In re Fleetwood*, L. R. 15 Ch. D. 594 (1880); *O'Brien v. Tyssen*, L. R. 28 Ch. D. 372 (1884); *Sharry v. Garty*, 2 Ir. Ch. Rep. 351 (1850); *O'Brien v. Condon*, [1905] 1 Ir. R. 51; *Buckingham v. Clark*, 61 Conn. 204, 23 Atl. 1085 (1891); *Caldwell v. Caldwell*, 7 Bush (Ky.) 515 (1870); *Chapman's Ex'r v. Chapman*, 152 Ky. 344, 153 S. W. 434 (1913); *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464 (1888); *Owings' Case*, 1 Bland (Md.) 370 (1826); *Olliffe v. Wells*, 130 Mass. 221 (1881) (*semble*); *Ham v. Twombly*, 181 Mass. 170, 63 N. E. 336 (1902) (*semble*); *Hooker v. Axford*, 33 Mich. 454 (1876); *Benbrook v. Yancy*, 96 Miss. 536, 51 So. 461 (1910); *Smullin v. Wharton*, 73 Neb. 667, 103 N. W. 288 (1905); *Williams v. Vreeland*, 29 N. J. Eq. 417 (1878), 32 N. J. Eq. 135, 734 (1880); *Yearance v. Powell*, 55 N. J. Eq. 577, 37 Atl. 735 (1897) (see *Powell v. Yearance*, 73 N. J. Eq. 117, 67 Atl. 892 (1907)); *O'Hara v. Dudley*, 95 N. Y. 403 (1884); *Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876 (1897); *Edson v. Bartow*, 154 N. Y. 199, 48 N. E. 541 (1897); *Peters v. Peters*, 122 N. Y. Supp. 363 (1910); *Golland v. Golland*, 84 N. Y. Misc. 299, 147 N. Y. Supp. 263 (1914); *Winder v. Scholey*, 83 O. St. 204, 93 N. E. 1098 (1910); *Vance v. Park*, 8 O. C. D. 425 (1898); *Hoge v. Hoge*, 1 Watts (Pa.) 163 (1832); *Jones v. McKee*, 3 Pa. St. 496 (1846); *McKee v. Jones*, 6 Pa. St. 425 (1847); *Church v. Ruland*, 64 Pa. St. 432 (1870); *Socher's Appeal*, 104 Pa. St. 609 (1883); *Blick v. Cockins*, 234 Pa. St. 261, 83 Atl. 196 (1912); *Rutledge v. Smith*, 1 McCord Ch. (S. C.) 119 (1825); *Towles v. Burton*, Rich. Eq. Cas. (S. C.) 146 (1831); *McLellan v. McLean*, 2 Head (Tenn.)

heading *post* in regard to active solicitation, etc. When a trust is enforced it is not the express trust, but a constructive trust to

684 (1859); *Stone v. Manning*, 103 Tenn. 232, 52 S. W. 990 (1899); *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143 (1892). Cf. *Podmore v. Gunning*, 7 Sim. 644 (1836); *In re Pitt Rivers*, *supra*; *Mead v. Robertson*, 131 Mo. App. 185, 110 S. W. 1095 (1908); *Aumack v. Jackson*, 79 N. J. Eq. 599, 82 Atl. 896 (1912). But see *Moore v. Campbell*, 102 Ala. 445, 14 So. 780 (1893), limited to devises and not applied to bequests in *Moore v. Campbell*, 113 Ala. 587, 21 So. 353 (1896).

For the minority cases, see n. 68, *post*.

That the Indiana rule is the same as the majority view has been doubted in view of *Orth v. Orth*, 145 Ind. 184, 42 N. E. 277 (1896) (see Amès, *Lectures on Legal History*, 430 n.), but the case of *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767 (1899) (see *Moore v. Ransdel*, 156 Ind. 658, 59 N. E. 936 (1901)), although a deed case instead of a will case, and although an instance of the prevention of a deed rather than the securing of a deed, makes it reasonably certain that the Indiana rule will be declared in accord with the majority view. In *Ransdel v. Moore* the intending grantor was on her deathbed and the court regarded the case as in effect one of prevention of a will. Cf. *Ahrens v. Jones*, 169 N. Y. 555, 62 N. E. 666 (1902), where a dying grantor gave a deed on an oral trust, and a trust was enforced for the intended *cestui* on the will theory. A similar case is *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679 (1903).

In many of the other deed on oral trust cases the fact that the grantor was dying or acted in contemplation of death, and but for the resort to a deed would have made a will, seems to have influenced the courts to find the breach of a special confidential relationship, or to presume fraud, as a basis for a constructive trust. See, for example, *Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559 (1908); *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 116 (1892); *Crossman v. Keister*, 223 Ill. 69, 79 N. E. 58 (1906); *Newis v. Topfer*, 121 Ia. 433, 96 N. W. 905 (1903); *Scheringer v. Scheringer*, 81 Neb. 661, 116 N. W. 491 (1903). Cf. *Devemish v. Barnes*, Prec. Ch. 3 (1689); *McDowell v. McDowell*, 141 Ia. 286, 119 N. W. 702 (1909).

For cases where it is not clear whether the promise was before or after the making of the will, but a trust was enforced, see *Nab v. Nab*, 10 Mod. 404 (1717); *Oldham v. Litchfield*, 2 Vern. 506 (1705); *French v. French*, [1902] 1 Ir. R. 172; *Shields v. McAuley*, 37 Fed. 302 (1888); *Hughes v. Bent*, 118 Ky. 609, 81 S. W. 931 (1904); *McAuley's Estate*, 184 Pa. St. 124, 39 Atl. 31 (1897); *Washington's Estate*, 220 Pa. St. 204, 69 Atl. 747 (1908).

In *Bennett v. Harper*, *supra*, a testator made a will leaving his home place to one of his daughters, after telling her husband that it was on condition that the husband should deed to another daughter a 600-acre tract of land which the testator had deeded to the husband some years before, and after being led to believe, by the husband's failure to object, that he acquiesced. The court declared a lien on the 600-acre tract in favor of the intended beneficiary "to the amount of the value of the 600-acre tract" with interest from the date of the suit and with an option on the husband's part to pay the amount or deed the land. One judge dissented on the ground that the burden should be thrown on the wife, who got the home place under the will, and not on the husband, and on the further ground that if the burden was to be thrown on the husband, he should be held to be a trustee and not merely subjected to a lien on his land. But clearly it was not a case for declaring a trust, as there was no trust *res*. *Robinson v. Denson*, 3 Head (Tenn.) 395 (1859). The relief given was the only relief theoretically proper, and if the case is to be sustained at all, it is as the reparation of an equitable

prevent the unjust enrichment of the legatee or devisee through his fraudulent retention of the legacy or devise in violation of his promise.⁶⁴ In Massachusetts, at least, it has been intimated by way of *dictum* that a constructive trust will be enforced even though the legacy or devise was expressly "upon a trust which is inconsistent with the secret trust."⁶⁵

tort. Was there such a tort in the absence of an actual fraudulent intent on the part of the husband at the time when, by his conduct, he induced the testator to make the devise to the wife?

⁶⁴ In *O'Hara v. Dudley*, *supra*, 413, 414, Finch, J., for the court, said:

"Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the devisor which equity will not endure. The authorities on this point are numerous. . . . All along the line of discussion [in the authorities] it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the Statute of Frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust, *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hulbert* (102 Mass. 40; 3 Am. Rep. 418). It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement while repudiating its obligations under cover of the statute.'"

Cf. *Smith v. Attersoll*, 1 Russ. 266 (1826) where the writing signed by the trustees and handed to the testator to evidence the trust was properly recognized as a valid declaration of trust, although it had not been proved as a testamentary paper.

The traditional attitude of courts of equity towards the Statute of Frauds and the Statute of Wills was expressed by Lord Westbury in *McCormick v. Grogan*, *supra*, p. 97, as follows:

"The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills."

"Fraud" in that passage should be interpreted to cover all unjust enrichment rectifiable in equity.

⁶⁵ *Ham v. Twombly*, *supra*, 172. If the express trust is inconsistent with the secret trust, it would seem that the secret trust must be communicated to the express *cestui que trust* for it to serve as a basis for raising a constructive trust. Unless the conscience of the express *cestui que trust* is charged by a communication to him of the testator's secret trust wishes, his equitable interest, derived under the statute as to wills, cannot properly be taken from him. If his conscience is so charged a construc-

Illegal promises. — If the legacy or devise induced by the promise is for an illegal purpose, as where the intended *cestui que trust* cannot take because of the Statutes of Mortmain, the legatee or devisee cannot keep for himself without being unjustly enriched and by the weight of authority must hold on a constructive trust for the next of kin, residuary legatee, heir, or residuary devisee,⁶⁶ unless the latter is a party to the illegal arrangement.⁶⁷

Where there is active solicitation, fraudulent intent at the time of promising, or a special confidential relationship. — In some jurisdictions it is only where the legatee or devisee is *active* in inducing

tive trust will be raised whether the testator's secret trust wishes were communicated to the express trustee or not.

⁶⁶ *Muckleston v. Brown*, 6 Ves. Jr. 52 (1801); *Strickland v. Aldridge*, 9 Ves. Jr. 516 (1804); *Edwards v. Pike*, 1 Eden 687 (1759); *Springett v. Jennings*, L. R. 10 Eq. Cas. 488 (1870); *Sweeting v. Sweeting*, 10 Jur. N. S. 31 (1864); *O'Hara v. Dudley*, *supra*; *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. 541 (1897).

Cf. *Gore v. Clarke*, and *Schultz's Appeal*, in n. 56, *ante*.

In *Jones v. Badley*, L. R. 3 Eq. Cas. 635, L. R. 3 Ch. 362 (1876); *Rowbotham v. Dunnett*, L. R. 8 Ch. 430 (1878); and *Flood v. Ryan*, *supra*, no illegal trust was proved. In *Flood v. Ryan*, *supra*, as there was no secret illegal trust, the fact that the devisee felt in conscience bound to apply the property as if there had been such a trust was deemed not to defeat the devise, since the statute raising the question of illegality applied only to devises to charity where the testator died within thirty days after making the will and did not forbid gifts to charities by devisees under such wills. One justice dissented.

In *Stirk's Estate*, 232 Pa. St. 98, 81 Atl. 187 (1911), the residuary estate was given on a secret trust in fraud of a charitable bequest statute, and the gift was simply declared void for fraud and the residuary estate directed to be distributed under the intestate laws of the state. In *Edson v. Bartow*, *supra*, a trust of part of the residue for the next of kin was declared.

In *Hofner's Estate*, 161 Pa. St. 331, 343, 29 Atl. 33, 35 (1894), where a gift to a church made in a will executed within thirty days of the testatrix's death was upheld in equity, despite the statute making such gifts void, because it was shown that the gift was made in pursuance of a bequest to testatrix on a promise given by her to leave the legacy to the church, Dean, J., for the court, said:

"This money goes to the church, not by the will, but because there is no valid will, when there ought to have been one; it is a right of the church, for whose benefit the promise was made, to insist on the fulfillment of the obligation in a court of equity in whose hands is the fund and before whom are all parties in interest."

The possible claim of the residuary legatee or devisee is usually overlooked, because in the cases which have arisen the trust has seemingly related to either the whole property of the deceased or else to part or all of the residue as such. The residuary legatee's or devisee's rights are properly safeguarded in the statement from 1 Jarman on Wills, 6 Eng. ed., quoted in n. 92, *post*.

In *Ford v. Dangerfield*, 8 Rich. Eq. 95 (1856), the trust of the residue being illegal and there being no next of kin, the state took "by escheat."

⁶⁷ See *Ham v. Twombly*, *supra*.

the legacy or devise, *i. e.*, coaxes the testator to give it on the assurance that his communicated wishes will be carried out, or intends at the time of the promise or assurance to repudiate it after testator's death, or is in a relation of special trust and confidence towards the testator, that he will be charged as trustee.⁶⁸ The requirement of active solicitation before charging the legatee or devisee as trustee is apparently the adoption of the view that such solicitation constitutes undue influence which will not make the legacy or devise void, but will justify equity in enforcing a trust against the wielder of the undue influence. The same idea seems to be back of the view that if a relation of special trust and confidence exists between the testator and the legatee or devisee, a constructive trust should be enforced.⁶⁹ Indeed, in these cases, as in the fraudulent-intent cases, some jurisdictions seem to proceed on the idea that if there is active solicitation, or breach of confidential relation, or intent at the time of promising not to perform the promise, equity, to prevent fraud, enforces the express oral trust rather than a constructive trust, just as in the part performance of oral contracts for the sale of land cases equity regards itself as enforcing the express oral contract. That equity may en-

⁶⁸ See *Moran v. Moran*, 104 Ia. 216, 73 N. W. 617 (1897); *Evans v. Moore*, 247 Ill. 60, 93 N. E. 118 (1910); *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 384 (1875); *Tennant v. Tennant*, 43 W. Va. 547, 27 S. E. 334 (1897). Cf. *Collins v. Hope*, 20 O. St. 493 (1851), but as to the Ohio rule to-day see *Winder v. Scholey*, *supra*. In *Evans v. Moore*, *supra*, the absence of a fraudulent intent on the part of the promisor at the time of making the promise prevented the enforcement of a trust, but equitable relief was given for other reasons.

⁶⁹ The undue-influence idea is more clearly developed in the deed on oral trust cases than in the will cases. In *Noble v. Noble*, 255 Ill. 629, 635, 99 N. E. 631, 633 (1912), in enforcing a trust because a grantee who took on an oral trust violated a confidential relationship in retaining the property for himself in breach of trust, the court said:

"The term 'fiduciary and confidential relation' is a comprehensive one and [a breach of the relation] exists whenever influence has been acquired and abused or confidence has been reposed and betrayed."

That is almost word for word the language used in *Leonard v. Burtle*, 226 Ill. 422, 431, 80 N. E. 992, 996 (1907), where, in considering whether a will was executed as the result of undue influence, Wilkin, J., for the court, said:

"What constitutes undue influence depends upon the circumstances of each case. To make a good will a person must be a free agent. But all influences are not unlawful. The doctrine of equity, however, concerning undue influence is broad, and it will reach every case and grant relief where influence is acquired and abused and confidence is reposed and betrayed."

force against the legatee or devisee the express oral trust, as such, under any circumstances, would seem to be an indefensible proposition, for the express-trust provisions and the will provisions of the Statute of Frauds and the provisions of subsequent statutes about wills were meant to bind equity judges; but, on the other hand, to say that equity should enforce a constructive trust only if there is active solicitation, a special confidential relation, or actual fraudulent intent at the time of the promise, is unduly to limit the constructive-trust jurisdiction and to give too great encouragement to dishonesty. It is the fact that the legacy or devise was given wholly because of testator's reliance on the legatee's or devisee's promise, and not the solicitation or other activity of the legatee or devisee, that is the important element for equity's consideration prior to the legatee's or devisee's repudiation of promise.⁷⁰ As for a special relation of trust and confidence, what better evidence of one could there be than that the testator, confiding in the promise of the legatee or devisee, made him the gift? Every case of a deed on an oral trust or promise relied on, or of a will on an oral trust or promise relied on, is on principle a case of a relation of special trust and confidence between the grantor and

⁷⁰ Accordingly, in *Benbrook v. Yancy*, *supra*, where the devisee did nothing that was active to induce the devise to her, and yet but for her promise the devise would not have been made, the court enforced a trust, although in the earlier case of *Ragsdale v. Ragsdale*, 68 Miss. 92, 8 So. 315 (1890), stress had been laid on the fact of activity as a constructive-trust element in these will cases.

In *Gilpatrick v. Glidden*, *supra*, 151, Virgin, J., for the court, said:

"Equity does not interfere with the will. That remains unchallenged. Nor does it assume to set aside the Statute of Frauds which the defendants invoke. But on account of her [the devisee's] conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it or its proceeds for her own exclusive benefit. . . .

"We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor, for the great current of English authority during the last two centuries, as well as that of this country, holds that, if either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect; and the latter by any words or acts calculated to, and which he knows do in fact cause the testator to believe that the devisee fully assents thereto and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement, — equity will decree a trust and convert the devisee into a trustee, whether, when he gave his assent he intended a fraud or not, — the final refusal having the effect of consummating the fraud."

grantee or between the testator and the legatee or devisee.⁷¹ Fraudulent intent at the time of the promise has no bearing on the problem save as showing a legal tort as well as a breach of promise, for the legal tort is not needed to enable equity to act. Equity cares not for mere form, and it should not care whether the unjust enrichment of the defendant through retention of the property in violation of his promise, which properly constitutes an equitable tort,⁷² is aggravated by a legal tort or not. Accordingly, in most jurisdictions, the fraudulent intent at the time feature may be ignored,⁷³ except in so far as the presence of a legal tort enables us to confirm our view that the trust should be enforced in favor of the intended *cestui que trust*.⁷⁴

It would seem, then, that active solicitation of the testator by the legatee or devisee in inducing the devise is not needed to enable equity to declare a trust; that a special relation of trust and confidence other than that constituted by the trust and confidence actually reposed is also not necessary; and that a fraudulent intent

⁷¹ In an anonymous article on "Equity and the Statute of Frauds," in 21 Bench and Bar 61, at p. 65, it is said of conveyances of oral trusts or promises to convey:

"The *confidential relation* has been referred to merely to show the abuse of trust which would result if the defendant were permitted to retain the property. But when one person parts with his property to another on the latter's promise to reconvey, he certainly *trusts* that other or he never would do what he did; and equity, it seems to us, should protect the trust regardless of the exact relations of the parties."

⁷² It is called an equitable tort simply because equity has a different estimate of what constitutes fraud from that entertained by the common-law courts. Similarly we have the phrase "equitable waste" just because equity judges construed the words "without impeachment of waste" in a different way than the law courts did.

⁷³ *McCormick v. Grogan*, *supra* (*semble*); *Curdy v. Berton*, 79 Cal. 420, 21 Pac. 858 (1889) (*semble*); *General Convention v. Smith*, 52 Ind. App. 136, 100 N. E. 384 (1913) (*semble*); *Chapman's Ex'r v. Chapman*, *supra*; *Gilpatrick v. Glidden*, *supra*; *Bailey v. Wood*, 211 Mass. 37, 97 N. E. 902 (1912) (*semble*); *Benbrook v. Yancy*, *supra*; *Smullin v. Wharton*, *supra*; *Yearance v. Powell*, *supra*; *Powell v. Yearance*, *supra*; *Winder v. Scholey*, *supra*; *Blick v. Cocksins*, *supra* (*semble*).

But *contra* see cases in note 68, *ante*.

⁷⁴ "If a devisee fraudulently induces the devise to himself, intending to keep the property in disregard of his promise to the testator to convey it or hold it for the benefit of a third person, and then refuses to recognize the claims of the third person, he is guilty of a tort, and equity may and does compel the devisee to make specific reparation for the tort by a conveyance to the intended beneficiary. If, on the other hand, the devisee has acquired the property with the intention of fulfilling his promise, but afterwards decides to break it, relying on the statute as a defense, he commits no tort, but a purely passive breach of contract." Ames, *Lectures in Legal History*, 430-431. See same passage in 20 HARV. L. REV. 549, 554.

at the time of the promise is no more important than fraudulent intent at the time for performance.⁷⁵

Some unsettled questions. — There are some unsettled problems as to what constitutes communication; as, for instance, whether there would be communication if the testator should mail to the legatee or devisee a letter expressing his intentions and die before its receipt, or should hand a letter of instructions to the legatee or devisee and die before it was read; as, for instance, where the testator should instruct the legatee or devisee, who did not know the letter's contents, not to open the letter handed to him until after the testator's death. Probably in neither of the supposititious cases should there be deemed to have been communication.⁷⁶

⁷⁵ "Trust[s], in cases of this character, are impressed on the ground of fraud, actual or constructive, and the basis or ground upon which fraud is imputed is that of holding the estate of the testator against conscience. It is not based necessarily on any imputation of fraud, or intention to defraud, at the time of making the promise, but of afterwards holding or attempting to hold the estate, as if the promise, on which the estate was received in its original condition, had not been made. The fraud consists in holding, or attempting to hold, the estate free from the effect or obligation of a promise, subject to which it was intended to be devised and received and which it is obligatory in conscience to carry out. Where the estate or interest therein is thus received by the person who made the promise, the attempt to hold the estate without performing the promise is an actual fraud, for the reason that the recipient, having actually made the promise, knows personally of the obligation and is guilty of actual fraud in holding, or attempting to hold, the estate without performing the promise, so far as his interest in the estate extends. As to such promisor, it is clearly not a question of modifying or cutting down plain and ambiguous devises in a will, by parol evidence or unattested papers, in violation of the Statute of Frauds or of Wills, for the devise to the promisor is not modified, but he is dealt with as a holder by fraud of property under the will, and a trust *ex maleficio* is raised from these facts." Emery, V. C., in *Powell v. Yearance*, *supra*, 126.

"It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the Statute of Frauds or the Statute of Wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise; the result of his refusal or failure to do so is the same in either case and equally fraudulent." Summers, C. J., in *Winder v. Scholey*, *supra*, 216.

Compare *Bailey v. Wood*, *supra*, 43, where Braley, J., for the court, said:

"The transaction may be none the less fraudulent in a court of equity, where the sole heir at law induces the ancestor to die intestate, honestly intending at the time to comply with his requests as to distribution of the estate, but upon receiving the inheritance changes his mind, and in disregard of his express promise deliberately appropriates the property to his own use."

⁷⁶ In *In re Boyes*, *supra*, 536, Kay, J., said:

"If the trust was not declared when the will was made, it is essential, in order to

Another unsettled question is whether information of testator's intentions given in testator's lifetime must be authorized by the testator to be given to the legatee or devisee for the latter to be bound.⁷⁷ The chances are that it will receive a solution similar to that stated in the revocation of offer of contract cases, where, by a

make it binding, that it should be communicated to the devisee or legatee in the testator's lifetime and that he should accept that particular trust. It may possibly be that he would be bound if the trust had been put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared, although he did not know the actual terms of the trust; *McCormick v. Grogan*, L. R. 4 H. L. 82. But the reason is that it must be assumed if he had not so accepted the will would be revoked." *Cf. Morrison v. McFerran*, [1901] 1 Ir. R. 360, where the legatee at testator's request signed a promise to pay legacies without knowing what the contents of the paper were other than that they related to the estate, but later the testator told the legatee about some of the payments which were to be made. The legatee was deemed a trustee as regards those payments only about which the testator told her his wishes.

In *In re Shields*, [1912] 1 Ch. 591, a testator who had provided a legacy of £300 for his housekeeper in his previously executed will drew a check for £300 and wrote a letter to the housekeeper which instructed her to "tell my executors that this is instead of the £300 left you in my will." Without telling the housekeeper what the letter and the check were, the testator, in her presence, sealed them up in an envelope and placed them in a drawer and told her to open the envelope on his death. Later he opened the envelope and took out the check and put the letter in another envelope and told her to keep it and open it on his death. Later he deposited £300 in bank to a joint account in the names of himself and the housekeeper with power to either to draw. On his death the questions arose whether the housekeeper was entitled to the £300 on deposit and whether she was entitled also to the £300 legacy. The court held that the £300 on deposit was the housekeeper's by a good gift *inter vivos*; that the contents of the letter instructing the housekeeper to tell the executors that the £300 was instead of the legacy were not communicated to her; and that in consequence there was no "ademption," *i. e.*, satisfaction, of the legacy, and accordingly she could keep the £300 and yet claim the legacy. The same theory of what constitutes communication should apply in the constructive-trust cases as was applied in this so-called "ademption" case.

⁷⁷ In *Moss v. Cooper*, 1 J. & H. 352, 370, 371 (1861), Vice-Chancellor Sir W. Page Wood said:

"When you prove that the testator desired to create a trust, and that this desire was communicated to the legatee by one who had acted as the testator's agent in the preparation of the will, you have *prima facie* evidence that the communication was made by the testator's direction. It is not necessary, for the purpose of my decision, to consider what the court ought to do in a case where the testator is proved to have had a particular wish, and that wish is proved to have been communicated to the legatee without the sanction or authority of the testator. That question does not in my opinion arise here, and when it does arise, it may require some consideration, what would be the result if the legatee, after receiving this unauthorized information, abstains from making any communication to the testator as to his acceptance or refusal of the trusts. That will be an entirely new case."

departure from principle, it is said that knowledge of the offerer's inconsistent action in disposing of the offered property to others, even though such knowledge is derived from third persons not authorized to impart it, has the same effect as if those persons were authorized.⁷⁸

Tacit promises. — If what is to be regarded as communication takes place, then a trust will be enforced even though the legatee or devisee did not expressly promise to carry out testator's wishes, but only tacitly did so,⁷⁹ provided a bind-

⁷⁸ *Dickinson v. Dodds*, L. R. 2 Ch. D. 463 (1876); *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284 (1887); *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134 (1904); *Watters v. Lincoln*, 29 So. Dak. 98, 135 N. W. 712 (1912).

⁷⁹ In *Amherst College v. Ritch*, *supra*, 324, 325, Vann, J., for the court, said:

"While a promise is essential it need not be expressly made, for active coöperation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of a legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator. As was said by this court in the O'Hara case, *supra* [95 N. Y. 403]: 'It matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told also that she would only have their honor and conscience on which to rely, and answered that she could trust them, which was an assertion of their duty. Where in such cases the legatee even by silent acquiescence encourages the testatrix to make a bequest to him, to be by him applied for the benefit of others, it has all the force and effect of an express promise.' . . . As was well said in *Wallgrave v. Tebbs*, *supra* [2 K. & J. 321]:

"Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of the promise or undertaking, it is in effect a case of trust; . . ."

See also *Russell v. Jackson*, 10 Hare 204 (1852); *Tee v. Ferris*, 2 K. & J. 357 (1856); *Jones v. Badley*, *supra*; *Springett v. Jennings*, *supra*; *Moss v. Cooper*, *supra*; *Edson v. Bartow*, *supra*; *Stirks' Estate*, *supra*; *Washington's Estate*, *supra*.

In *Mead v. Robertson*, *supra*, where the court refused to find decedent's half-sister and only heir a trustee because, when she was in an adjoining room and may or may not have heard and when neither she nor decedent understood that her consent or refusal was necessary, her husband promised decedent that his wishes would be carried out, the court, by Ellison, J., said that fraud is the base of the action, since the action's object is "to arrest the consummation of a fraud. . . . Therefore since a wilfully broken promise, made in aid of the promisee's definite intention which thwarts such intention and prevents other action, is a fraud, equity affords relief to the bene-

ing obligation to perform was intended and not a mere moral obligation.⁸⁰

Where the legatee or devisee promises the testator to hold for or to pay or convey to others whose names are communicated to him in the testator's lifetime and the express or tacit promise made prevents the revocation or modification of the legacy or devise. — We have seen that, if a legacy or devise is induced by the promise of the legatee or devisee to carry out the testator's wishes expressed in a form not meeting the statutory requirements for wills, but communicated to the legatee or devisee in the testator's lifetime, a constructive trust will be enforced. By the overwhelming weight of authority a trust will be enforced where the original insertion in the will of legacy or devise was not induced by the promise, but where, after the will was executed, the testator communicated to the legatee or devisee his instructions that the latter should hold for the benefit of persons named and received his express or tacit assent to do so, and in reliance thereon refrained from revoking the gift to the legatee or

ficiaries of the promise. There must not only be an expressed intention, but there must be a promise made to carry out such intention; otherwise there would be no breach of promise and consequently no fraud by the promisor." (110 S. W., at p. 1096.) The court admitted that "Proof of a promise on the part of the heir or devisee need not be that it was expressly made. The proof may consist in the silence of the promisor on hearing the declaration of the deceased's intentions" (p. 1097), but it considered that no silence could count as a promise unless speech was expected by the one party or reasonably to be deemed expected by the other. While the court could have put its decision on the ground that the testator would not have made a will anyhow, it put it solely on the ground that no promise was intended to be exacted from and none was actually or tacitly given by the heir. *Cf. Lomax v. Ripley*, 3 Sm. & Giff. 48 (1854).

⁸⁰ In *Amherst College v. Ritch*, *supra*, 323, Vann, J., for the court, said:

"While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still, if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he had made no promise and none has been made in his behalf, takes an absolute title and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him." See *Lomax v. Ripley*, *supra*; *Rowbotham v. Dunnnett*, *supra*; *O'Donnell v. Murphy*, 13 Cal. App. 728, 120 Pac. 1076 (1911).

In *Creagh v. Murphy*, 1r. R., 7 Eq. 182 (1873), the testatrix told the legatee her wishes but left what was to be paid by him to any one to his discretion. As he had exercised his discretion by making some payments, it was held that no trust would be enforced. But see *Jones v. Nabbs*, Gilb. Eq. 146 (1718).

devisee.⁸¹ In at least one jurisdiction, however, the line seems to be drawn between inducing a will in one's favor by a promise, which action is there deemed to justify raising a constructive trust,⁸² and preventing by an oral promise the revocation of a legacy or devise, which action is there held not to justify raising a trust.⁸³ Also, in England, where less than all of several, who take

⁸¹ *Reech v. Kennegal*, 1 Ves. 123 (1748); *Barrow v. Greenough*, 3 Ves. Jr. 152 (1769); *Chamberlaine v. Chamberlaine*, 2 Freem. Ch. 34 (1678); *Tee v. Ferris*, *supra*; *Moss v. Cooper*, *supra* (*semble*); *Norris v. Frazer*, L. R. 15 Eq. Cas. 318 (1873); *In re Maddock*, *supra*; *Attorney-General v. Cullen*, 14 Ir. C. L. R. 137 (1863); (*aff'd Cullen v. Attorney-General* L. R. 1 H. L. 190 (1866)); *In re King's Estate*, *supra*; *DeLaurencel v. DeBoom*, 48 Cal. 581 (1874); *Dowd v. Tucker*, 41 Conn. 197 (1874); *Gaither v. Gaither*, 3 Md. Ch. 158 (1851) (*semble*); *Ragsdale v. Ragsdale*, *supra*; *Belknap v. Tillotson*, 82 N. J. Eq. 271, 88 Atl. 841 (1913); *Carver v. Todd*, 48 N. J. Eq. 102, 21 Atl. 943 (1891); *Rutherford v. Carpenter*, 119 N. Y. Supp. 790 (1909); *Hoffner's Estate*, *supra*; *Richardson v. Adams*, 10 Yerg. (Tenn.) 273 (1837); *Brook v. Chappell*, 34 Wis. 405 (1874). Cf. *Wekett v. Raby*, 3 Bro. Parl. Cas. 16 (1724); *Van Houten v. Stevenson*, 74 N. J. Eq. 1, 77 Atl. 612 (1907); *Sims v. Walker*, 8 Humph. (Tenn.) 503 (1847).

For cases where it is not clear whether the promise was before or after the making of the will, see *Nab v. Nab*, *supra*; *Oldham v. Litchfield*, *supra*; *French v. French*, *supra*; *Shields v. McAuley*, *supra*; *Hughes v. Bent*, *supra*; *McAuley's Estate*, *supra*; *Washington's Estate*, *supra*.

In *French v. French*, *supra*, 230, Lord Davey in his concurring opinion said:

"My Lords, it is said that this jurisdiction is based upon fraud, and so it is because if you once get to this, that it is a trust which is imposed upon the conscience of the legatee, then if the legatee betrays the confidence in reliance upon which the bequest was made to him, then it is what I should think everybody would consider a fraud, though I take the liberty to say that the moral turpitude of any particular case must vary infinitely according to the circumstances of the particular case. My Lords, the basis of it is, of course, that the testator has died, leaving the property by his will in a particular manner, on the faith and reliance upon an express or implied promise by the legatee to fulfill his wishes, and your Lordships will at once see that it makes no difference whatever whether the will be made before the communication to the legatee or afterwards, because, as was said, I think by Vice-Chancellor Turner, in one of the cases which were cited, the presumption is that the testator would have revoked his will and made another disposition if he had not relied upon the promise, express or implied, made by the legatee to fulfill his wishes."

⁸² *Blick v. Cockins*, *supra*. Cf. *Miller v. Cockins*, 239 Pa. St. 538 (1913).

⁸³ *Fox v. Fox*, 88 Pa. St. 19 (1878); *McCloskey v. McCloskey*, 205 Pa. St. 491, 55 Atl. 180 (1903). In *McCloskey v. McCloskey*, *supra*, a father, after making his will in favor of his wife for life and after her death for his daughters, told the daughters that they were to hold for themselves and their three brothers equally, and they agreed to do so. After the father's death the daughters refused to perform, and it was held that their refusal to perform was not such misconduct as to raise a trust. Brown, J., for the court, said (p. 496):

"Where an absolute devise is procured through the promise of a devisee that he will hold it for such uses and purposes or for such beneficiaries as the testator may desig-

under the will as joint tenants, induced the making of the will by an oral promise, all will be bound by a constructive trust; but if the promisors simply prevented by their promise the revocation of a will previously made, only those who gave the promise will be bound by a trust.⁸⁴ It is admittedly illogical to draw such a line.⁸⁵

In the case of a promise which prevents the revocation of a legacy or devise, the same difference of opinion would seem to exist as to the necessity of solicitation, of confidential relationship, and of fraudulent intent at the time of promising, as applies in the case of a promise which induces the legacy or devise.⁸⁶ In the case of an illegal promise, also, the same rule applies in both situations.⁸⁷

Where the heir or next of kin promises the ancestor to hold for or to pay or convey to others whose names are communicated to him in the ancestor's lifetime and the promise is made to secure intestacy in whole or in part. — If the making of a will is prevented, or the revocation of a will is secured, and the intending testator is persuaded to die intestate as to the property he intended to will, by the promise of the heir or next of kin to carry out his wishes, a constructive trust will be enforced against the heir or next of kin who so promised and against any transferee of his who is not an innocent purchaser for value.⁸⁸ No case seems to have drawn the line

nate, the breaking of the promise, without which the devise would not have been made, is bad faith to the testator. . . . But unkept promises, declarations, or misrepresentations, which will create trustees *ex maleficio*, must be made before or at the time the legal title is acquired or the devise made; for nothing subsequently said by a grantee or devisee will turn an estate that had passed absolutely from the grantor or testator into a trust for others."

The court apparently thought that the devise took effect on the making of the will. In other words, it would seem to be because the court overlooked the very elementary fact that a will is ambulatory, *i. e.*, that the legal title does not pass until the testator's death, that it decided as it did.

⁸⁴ See *In re Stead*, [1900] 1 Ch. 237.

⁸⁵ *Ibid.*, per Farwell, J., quoted *post*, p. 387.

⁸⁶ That fraudulent intent at the time of promising is not required see *In re Maddock*, *supra*; *French v. French*, *supra*; *DeLaurencel v. DeBoom*, *supra*; *Hoffner's Estate*, *supra* (*semble*).

But, *contra*, see *McCloskey v. McCloskey*, *supra* (*semble*).

⁸⁷ But see *Burney v. Macdonald*, 15 Sim. 6 (1845).

⁸⁸ *Cassey v. Fitton*, 2 Harg. Jur. Arg. 296 (1679); *cf.* 1 Ames, Cases Eq. Jur. 145; *Harris v. Horwell*, Gilb. Eq. 11 (1708); *McDowell v. McDowell*, 141 Ia. 286, 119 N. W. 702 (1909) (*estoppel*); *Gammel v. Fletcher*, 76 Kan. 577, 92 Pac. 713 (1907); *Browne v. Browne*, 1 Harr. & Johns. (Md.) 430 (1803); *Bailey v. Wood*, *supra* (*semble*). But see *Campbell v. Brown*, 129 Mass. 23 (1880); *Grant v. Bradstreet*, 87 Me. 583, 33 Atl.

between prevention of the making of a will or of a particular legacy or devise and inducing the revocation of a will or of a particular legacy or devise, but the same difference of opinion exists here as in the other situations discussed above as to the necessity of solicitation, confidential relationship, or fraudulent intent at the time of promising.⁸⁹ In practically every case of this particular kind, however, there will probably be found to have been active solicitation.

Where the will discloses that the legatee or devisee is to hold in trust, but does not disclose the terms. — In the legacy or devise cases on oral trust discussed so far, the will did not disclose the fact that there was any trust. There are, however, cases where the will discloses that the legatee or devisee is to dispose of the property according to instruction already communicated, or thereafter to be communicated, to him by the testator. If in such case the instructions are not made known to the legatee or devisee, he must hold in trust for some one, and the only one is the next of kin, residuary

165 (1895); *Norton v. Mallory*, 63 N. Y. 434 (1875); *Tyler v. Stitt*, 132 Wis. 656, 112 N. W. 1091 (1907). See *Sellack v. Harris*, 2 Eq. Cas. Abr. 46, pl. 11, 5 Vin. Abr. 521, pl. 31 (1708), where a resulting trustee notified his heir of the trust and got his promise to perform it, but where, of course, the promise was not needed, and *Bulkley v. Wilford*, 2 Cl. & F. 102 (1834), where there was no promise, but where the heir was seeking to profit by the revocation of a will as to all of testator's lands unnecessarily, and seemingly unknown to the testator, caused by a fine being levied of all the land on advice given by the heir as the testator's solicitor when only part of the land was to be transferred. In both cases a trust was enforced. Cf. *Ransdel v. Moore*, *supra*, where the giving of a deed by a dying grantor was prevented by the promise and the will-case rule was applied, and *Scott v. Harris*, 113 Ill. 447 (1885), where a husband conveyed to his wife to hold and manage property and apply the estate according to the husband's then existing will, but the grantor was not dying and no constructive trust was enforced.

In *Browne v. Browne*, *supra*, unlike the usual case, there was a bilateral contract.

In *Bedilian v. Seaton*, 3 Wall. Jr. 279 (1860), it was not shown that a will would have been made if the promise had not been given. In *Campbell v. Brown*, *supra*, no promise by the heir seems to have been shown, and if there was one, it was not the promise but the sudden decease of the intestate that prevented the making of a will embodying his wishes. Cf. *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240 (1901).

⁸⁹ That fraudulent intent at the time of making the promise need not be shown, see *McDowell v. McDowell*, *supra* (estoppel); *Gemmel v. Fletcher*, *supra*; *Grant v. Bradstreet*, *supra*; *Bailey v. Wood*, *supra*; *Mead v. Robertson*, *supra* (semble); *Norton v. Mallory*, *supra* (semble).

But see, *contra*, *Cassels v. Finn*, 122 Ga. 33, 49 S. E. 749 (1905); *Bedilian v. Seaton*, *supra* (semble).

It is difficult to appraise *Tyler v. Stitt*, *supra*.

legatee, heir, or residuary devisee.⁹⁰ If, however, the instructions are communicated to the legatee or devisee by the testator in his lifetime, then the legatee or devisee should be made to hold on a constructive trust for the intended *cestui que trust*. There is, however, a conflict of authority on the point.⁹¹ The jurisdictions which

⁹⁰ *Juniper v. Batchelor*, *supra*; Ames, Cases on Trusts, 2 ed., 189; *In re Boyes*, *supra*; *Scott v. Brownrigg*, *supra*; *Bryan v. Bigelow*, 77 Conn. 604, 60 Atl. 266 (1905); *Thayer v. Wellington*, 9 Allen (Mass.) 283 (1864); *Gross v. Moore*, 22 N. Y. Supp. 1019 (1893). Cf. *Briggs v. Penny*, 3 De G. & Sm. 525 (1849); *In re Keenan*, 94 N. Y. Supp. 1099 (1905).

In *In re Gardom*, *Le Page v. Attorney-General*, [1914] 1 Ch. 662, 672-3, Eve, J., in the lower court, expressed a doubt as to the need, on principle, of a communication to the trustee in such a case, if only a communication, "properly proved," was made to some one. He said: "Where there is nothing in the will disclosing any trust, one can appreciate why communication of the trust to and its acceptance by the legatee is essential, but the considerations applicable to a case where the legatee takes beneficially under the will, and is only converted into a trustee by reason of the trust being disclosed to and accepted by him, do not, I should have thought, in any way apply to a case where it is made clear on the face of the will that he is to take as trustee and not beneficially. In the last mentioned cases the problem is to find out what is the trust, not whether there is a trust at all, and speaking for myself, I do not see why a communication to the trustee should be an essential element in the solution of the problem, or, indeed, of any greater value than a communication made to any other person, and of course properly proved. But *In re Fleetwood*, 15 Ch. D. 594, and the other authorities appear to have established that there must be a communication to the trustee and I must accept that position." See n. 62, *ante*.

⁹¹ That on a bequest or devise, expressly made to carry out the unattested directions of the testator communicated in his lifetime to the legatee or devisee, the legatee or devisee must hold for the intended *cestui que trust*, see *In re Huxtable*, [1902] 2 Ch. 793; *Pring v. Pring*, 2 Vern. 98 (1689); *Irvine v. Sullivan*, L. R. 8 Eq. 673 (1869); *In re Spencer's Will*, 57 L. T. R. 519 (1887); *In re Fleetwood*, *supra*; *Riordan v. Banon*, 10 Ir. Eq. R. 469 (1876); *Attorney-General v. Dillon*, 13 Ir. Ch. Rep. 127 (1862); *Attorney-General v. Cullen*, *supra* (*semble*), *aff'd Cullen v. Attorney-General*, *supra*; *Morrison v. McFerran*, [1901] 1 Ir. R. 360; *In re King's Estate*, *supra* (*semble*); *Curdy v. Berton*, *supra*; *Jay v. Lee*, 41 N. Y. Misc. 13, 83 N. Y. Supp. 579 (1903); *Golland v. Golland*, *supra* (*semble*); *Williams's Appeal*, 73 Pa. St. 249 (1873) (*semble*). See also *Cagney v. O'Brien*, 83 Ill. 72 (1876), where executors who took under oral instructions mentioned in the will, and who carried them out, were protected. Cf. also *In the Goods of Marchant*, [1893] P. 284; *Podmore v. Gunning*, *supra*; *Smith v. Attersoll*, 1 Russ. 266 (1826); and *O'Brien v. Condon*, *supra*. But see *Balfe v. Halpenny*, [1904] 1 Ir. R. 486, where the trust was not enforced for the *cestuis que trust* whom the testator told one of the trustees about, after the will was executed, but for the next of kin, and *Johnson v. Ball*, 5 De G. & Sm. 85 (1851) where a trust was enforced for residuary legatees although the testator's wishes were communicated to both trustees. And cf. *Creagh v. Murphy*, Ir. R., 7 Eq. 182 (1873).

That the legatee or devisee cannot safely perform to the intended *cestui que trust*, but must instead hold for the next of kin, residuary legatee, heir, or residuary devisee, see *Balfe v. Halpenny*, *supra*; *Bryan v. Bigelow*, *supra*; *Olliffe v. Wells*, *supra*; *Wilcox v.*

make the legatee or devisee hold as if the terms of the trust had not been communicated, proceed on an erroneous theory of what happens in the latter case. That erroneous theory is that, when a legacy or devise is expressly "in trust," but the trusts are not expressly specified, the equitable interest never passes out of the testator by the will, and so goes as in case of intestacy.⁹² That

Attorney-General, 207 Mass. 198, 93 N. E. 599 (1911); *Smith v. Smith*, 54 N. J. Eq. 1, 32 Atl. 1069 (1895); *In re Keenan*, *supra* (semble). But see *Golland v. Golland*, *supra* (semble *contra*); *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382 (1892); *Sims v. Sims*, 94 Va. 580, 27 S. E. 436 (1897). Cf. *Davison v. Wyman*, 214 Mass. 192, 100 N. E. 1105 (1913). In *Smith v. Smith*, *supra*, the court followed *Olliffe v. Wells*, *supra*, although the will showed that the trust was for charity. *Wilcox v. Attorney-General*, *supra*, is in accord. *In re Huxtable*, *supra*, is the charity case *contra* to *Smith v. Smith* and *Wilcox v. Attorney-General*, *supra*.

But even where a trust will be enforced the doctrine is not applied to powers of appointment to be exercised according to secret instructions. *In re Hetley*, [1902] 2 Ch. 866; *Reid v. Atkinson*, Ir. R. 5 Eq. 373 (1871) (semble).

While in *In re Huxtable*, *supra*, evidence was admitted to show what the charitable purposes agreed upon between the testator and the legatee as mentioned in the will were, it was held not admissible to show that only the interest of the £4000 bequeathed was to be used for charitable purposes by the legatee, who was to dispose of the principal at his death as his own. In concurring in holding that the bequest of £4000 "for the charitable purposes agreed upon between us" could not be cut down in that way without contradicting the will, Stirling, L. J., in his separate opinion, said (p. 797):

"If, for instance, the affidavit [of the legatee] had stated that a conversation had taken place with reference to a legacy of £2000, and that by her will the testatrix had bequeathed £4000 for the charitable purposes, it could never, as it seems to me, be contended that the amount of the legacy was to be cut down and that the charities were to have only £2000, because the conversation related to £2000, whereas by her will the testatrix expressly said that £4000 was to be applied to the charitable purposes. In like manner it appears to me that, when the will says that the capital sum of £4000 is to be applied to the charitable purposes, it is not competent for the court to look at the evidence for the purpose of cutting down the gift to the income of £4000 during the life of [the legatee] Mr. Crawford."

⁹² In *Olliffe v. Wells*, *supra*, 225, 226, Gray, C. J., for the court, said:

"Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. *Cullen v. Attorney-General*, L. R. 1 H. L. 190. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the *cestuis que trust*; and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. *Boson v. Statham*, 1 Eden 508; cf. 1 Cox Ch. 16; *Russell v. Jackson*, 10 Hare 204; *Wallgrave v. Tebbis*, 2 K. & J. 313.

"Where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no bene-

theory is erroneous, because it assumes that the testator dies possessed of two separate interests in the property, *viz.*, a legal in-

ficial interest; and as between him and the beneficiaries intended, there is as much ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not excluded by the will itself. The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See *Lewin on Trusts*, 3 ed., 75."

The weakness of the foregoing analysis is pointed out in the text, but here should be noted the court's failure by proper language to preserve the rights of residuary legatees or devisees where the trust is not of part or all of the residue. That the residuary legatee or devisee may have rights if the trust cannot take effect is clear. As is said in 1 *Jarman on Wills*, 6 Eng. ed., 909-910:

"Where the fact that a gift to A. is made to him merely as trustee appears on the face of the will, he cannot in any case take beneficially, and if the trust is not established, or is illegal, or fails, he holds upon trust for the residuary legatee (or devisee) or the next of kin (or heir at law) as the case may be. This is so even if it appears from the evidence that, subject to the trusts which fail, the testator intended the trustee to take the property for his own benefit. *Re Baillie*, 2 T. L. R. 660."

Massachusetts adheres to the rule of *Olliffe v. Wells* even in the case of a trust for charity where the charitable objects to be selected can be ascertained only upon resort to the verbal communications of the testator to the trustee. *Wilcox v. Attorney-General*, *supra*. Cf. *Thayer v. Wellington*, *supra*.

What the Massachusetts rule would be if the language in the will should be deemed not to disclose a trust as intended, but instead, in addition to failing to set forth any terms of trust, should be determined to be merely precatory, and if, nevertheless, there was an oral-trust understanding between the testator and the legatee or devisee, is not so clear. Probably, however, the oral trust would be used as the basis for a constructive trust. See *Ham v. Twombly*, *supra*. The supposititious case could hardly arise, however, because the practical effect of the court's knowledge that there was a trust intended would probably be that it would interpret the precatory language to be trust language, and therefore deny the intended *cestui que trust* any relief. In *Golland v. Golland*, *supra*, precatory language in the will was not allowed to interfere with the enforcement of a constructive trust in favor of the intended *cestui que trust* of the oral trust (see also *Crook v. Brooking*, 2 Vern. 50 (1688); *Edson v. Bartow*, *supra*), and that should be the rule even in Massachusetts, since the reasons given for the decision in *Olliffe v. Wells*, *supra*, do not apply if the language in the will is only precatory.

It should be noted that *Olliffe v. Wells*, *supra*, and *Wilcox v. Attorney-General*, *supra*, apply only when the will declares that there is a trust, but not what the trust is. Where the will expresses the trust in sufficient terms, but the testator arranged a secret

terest and an equitable, whereas he could have and did have only one. Our law of merger of estates and of other interests of itself makes that true.⁹³ What happens on a devise expressly "in trust," but on trusts not expressed, is that on testator's death all his interest passes under the will, and then equity imposes a trust because of the clear expression of intention that the legatee or devisee should not keep beneficially. That trust is not an express trust in writing, — the words "in trust" or equivalent words in the will simply negative any presumption that the devisee is to take beneficially, — and in so far as the devisee seeks to keep for himself it is in no sense express but is wholly constructive.⁹⁴ Accordingly equity can and should select the *cestui que trust* for this constructive trust *cy pres* the testator's intentions and in harmony with the devisee's promise. Where the devisee does not try to keep for himself, but stands indifferent and compels chancery to tell him for whom to hold, the same conclusion would seem to be sound. Where, however, the devisee does not try to keep the property devised, and is not indifferent, but instead seeks to carry out the testator's wishes, chancery does not have to enforce any trust whatever. It should not interfere with the carrying out of the express oral or otherwise unattested trust, because there is no express written trust in conflict with it to suggest such action, even if such an express written trust would justify such interference,⁹⁵ and because there is no unjust enrichment to be rectified by the creation and enforcement of a constructive trust. The case where a legacy or devise is expressly "in trust," but the terms of the trust and the names of the intended beneficiaries are not found in the will, but were communicated by the testator to the legatee or devisee, should be decided exactly the same way as the case where

trust inconsistent with the express trust, a Massachusetts *dictum* suggests that the secret trust will be made the basis of a constructive trust. *Ham v. Twombly, supra*. To deprive the express *cestuis que trust* of their interests because of a secret oral arrangement between their express trustee and the testator, of which they learn only after the testator's death, would seem, however, to be wrong.

⁹³ If, as the writer believes, an equitable interest is a right *in personam*, that fact is an additional reason for asserting that the property right of one who owns in severalty the fee simple in realty, or the absolute interest in personalty, is not split up into a legal interest and an equitable one. See Ames' Lectures on Legal History, pp. 288-289. See same passage in 5 HARV. L. REV. at pp. 392-393.

⁹⁴ See 12 Mich. Law Rev. 518, n.

⁹⁵ Cf. n. 65, *ante*, and the text to which it belongs.

the legacy or devise is absolute on its face and the same communication took place.

Occasionally on a fair construction of a will the legacy or devise is found not to be wholly for trust purposes, but is, instead, a gift of property subject to a trust not fully disclosed by the will; and in such case the legatee or devisee takes the part of the legacy or devise not needed for the carrying out of the trust.⁹⁶ That is of course the usual disposition of the property where there are secret trusts not referred to in the will itself.

Promises by less than all who take as tenants in common or joint tenants. — So far we have been considering the case of a promise made by a sole legatee or devisee. The case of a promise or promises made by all of joint legatees or devisees is, of course, the same in principle.⁹⁷ But the case of a joint legacy or a joint devise given on a promise made by less than all has led to some differences of opinion. That those who promise will be deemed constructive trustees whenever they would have been if they had been sole legatees or devisees is clear,⁹⁸ and no doubt chancery would not permit the death of the promisors, in the case of joint tenancy where less than all promise, to defeat the trust, even though to enforce the trust against the survivors would operate *pro tanto* to depreciate the right of survivorship in the case of joint tenancy. But should those who did not promise be bound by a constructive trust? The question is far from easy and the answers given by the courts are conflicting. The English answer is given and English authorities collected in Farwell, J.'s, opinion in *In re Stead*,⁹⁹ as follows:

"The authorities establish the following propositions:

"If A. induces B. either to make or to abstain from revoking a will leaving him property by expressly promising or tacitly consenting to carry out B.'s wishes concerning it, the court will hold this to be a trust and will compel A. to execute it. See *McCormick v. Grogan*, L. R. 4 H. L. 82, 89 (1869). . . .

"If A. induces B. either to make, or to leave unrevoked, a will leaving

⁹⁶ *Irvine v. Sullivan*, [1869] L. R. 8 Eq. 673; *Wood v. Cox*, 2 Myl. & Cr. 684 (1837). Cf. *In re West*, [1900] 1 Ch. 84.

⁹⁷ In *Gray v. Gray*, 11 Ir. Ch. 218 (1860) the testator told his wishes to one of the two joint legatees and devisees before the will was executed and to the other after it was executed, and a trust was enforced against both.

⁹⁸ *Yearance v. Powell*, *supra*.

⁹⁹ *Supra*.

property to A. and C. as tenants in common, by expressly promising or tacitly consenting that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after B.'s death, A. is bound, but C. is not bound: *Tee v. Ferris*, 2 K. & J. 357; the reason stated (*Ibid.* 368) being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust.

"If, however, the gifts were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C.: *Russell v. Jackson*, 10 Hare 204; *Jones v. Badley*, L. R. 3 Ch. 362, the reason stated being that no person can claim an interest under a fraud committed by another: in the latter case A. and not C. is bound: *Burney v. Macdonald*, 15 Sim. 6, and *Moss v. Cooper*, 1 J. & H. 352, the reason stated (1 J. & H. 367) being that the gift is not tainted with any fraud in procuring the execution of the will.

"Personally I am unable to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes, but apparently a distinction has been made by the various judges who have had to consider the question. I am bound, therefore, to decide in accordance with these authorities and accordingly I hold that the defendant Mrs. Andrew [the one of two joint tenants to whom the terms of the trust, if any, were not disclosed] is not bound by any trust [since the terms of the trust were communicated to the other joint tenant after the making of the will]." ¹⁰⁰

¹⁰⁰ Cf. *Rowbotham v. Dunnett*, *supra*; *In re King's Estate*, *supra*; *Geddis v. Semple*, [1903] 1 Ir. R. 73. In *Russell v. Jackson*, *supra*, the will gave the residue to two on a promise by one to the knowledge of the others, who did not dissent in testator's lifetime. That was in effect a promise by both. Cf. *Springett v. Jenings*, *supra*.

In *Turner v. Attorney-General*, 10 Ir. Eq. 386 (1876) an admission of trust in the will of one joint tenant was held not binding on the surviving joint tenants. Whether the joint tenant making the admission talked to the testator before or after making his will, or even if he ever talked to him about his wishes, did not appear.

In *In re Gardom*, *Le Page v. Attorney-General*, [1914] 1 Ch. 662, the Court of Appeal found that there was no communication of a secret trust. Eve, J., in the court below, thought that both before and after the will was made there was communication of a secret trust to one of two trustees under a gift of the residue to the trustees to be expended "in such manner as they know to be most in agreement with my desires." As trustees take as joint tenants, Eve, J., on his theory of the evidence, was fully justified under the English cases in enforcing a constructive trust on a communication of the secret trust prior to the making of the will to one of two trustees and on a tacit assumption of the secret trust by that one.

Few American cases have faced the joint-tenancy problem because in American jurisdictions, by statute in the case of realty and statute or judicial legislation in the case of personalty, gifts by deed or will to two or more are presumed to create tenancy in common, in the absence of express words of joint tenancy. It would be a very unusual will that would give on oral trust to two or more expressly directed to take as joint tenants, and would not also expressly state the trusts on which they were to take.¹⁰¹

With reference to tenancy in common there is a very decided difference of opinion. In *Powell v. Yearance*¹⁰² it is held that the unauthorized promise of one tenant in common to carry out testator's wishes, made to the testator in the absence of the others, to induce the testator to sign a prepared will without waiting for changes, could not be made the basis of a constructive trust against the others who did not learn of the promise until after the testator's death.¹⁰³ In that case Emery, V. C., said:

"It is considered that to give effect to such assurances [by one tenant in common for others] would contravene the Statute of Wills and would entitle one beneficiary to deprive the rest of their benefits by setting up a secret trust."¹⁰⁴

On the other hand, in *Hooker v. Axford*,¹⁰⁵ in *Amherst College v. Ritch*,¹⁰⁶ and in *Winder v. Scholey*,¹⁰⁷ it was held that where the promise was made by one for all, and was the sole inducing cause of the gift to them, those who did not promise could not take without ratifying the promise made in their behalf and therefore could not retain in repudiation of the promise without being unjustly enriched.

In *Hooker v. Axford*¹⁰⁸ an attorney advised a wife to devise her property absolutely to him and to her nephew on the oral promise of the attorney that they would hold for the testatrix's husband. She did so and died, and the attorney and the nephew repudiated

¹⁰¹ In *Powell v. Yearance*, *supra*, 127, Emery, V. C., pointed out that the case before the court was one of tenancy in common and not of joint tenancy. In *Winder v. Scholey*, *supra*, 225, Summers, C. J., said that "There is no joint tenancy in this state and the distinction made in the English cases cannot be made here." The case of *O'Hara v. Dudley*, *supra*, however, was a case of devise to joint tenants on an oral trust.

¹⁰² *Supra*.

¹⁰³ See also *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233 (1907).

¹⁰⁴ *Supra*, 127.

¹⁰⁵ *Supra*.

¹⁰⁶ *Supra*.

¹⁰⁷ *Supra*.

¹⁰⁸ *Supra*.

the trust. In enforcing a trust for the husband, Cooley, C. J., said for the court:

"The will, then, must be regarded as made as it was because Crocker, who was an attorney at law, advised that it should be. If he had given the advice intending to appropriate the property, this would have been a gross fraud and a gross breach of confidence. It would be equally a fraud if, having given the advice honestly, he should afterwards conclude dishonestly to retain the lands. And this being his position, the party who, under his advice is associated with him, is in the like position. It would be a fraud in Axford to appropriate that which only by the advice of Crocker, given for another person's benefit, is brought within his reach. The fraud on Mrs. Hooker's estate would be exactly the same, whether one or the other of the nominal beneficiaries repudiates the trust.¹⁰⁹

In *Amherst College v. Ritch*,¹¹⁰ where the gift in the will was to Mr. Ritch, Mr. Vaughan, and Mr. Bulkley, but on an oral agreement whereby Mr. Ritch and Mr. Vaughan for themselves and for Mr. Bulkley, but without authority from him, promised the testator to hold for certain purposes, Vann, J., for the court, said:

"As the gift was to them as tenants in common, a promise that bound all was necessary in order to include each of the three shares. That Mr. Ritch and Mr. Vaughan duly promised appears so conclusively from their conduct, letters, and statements to the testator, that we do not regard any further expression of our views upon the subject as necessary. It is, however, strenuously urged that Mr. Bulkley made no promise, and hence that the secret trust did not extend to his share of the gift. If he were the only residuary legatee the question would be more serious, but he was not. The trial court found that Messrs. Ritch and Vaughan promised for themselves and for Mr. Bulkley, and the evidence plainly warrants this conclusion. The General Term, in its opinion, went farther and declared that there was an understanding between Mr. Bulkley and the testator to the same effect, but the evidence to sustain this conclusion is meagre, although we do not hold it was insufficient. Assuming, however, that Mr. Bulkley made no promise, still we think that he was bound, under the circumstances, by the promise made in his behalf, and that he cannot profit by the action of his co-tenants in making the promise for him, as that would be a fraud. He was not a purchaser; he furnished no consideration; there was no contract for his benefit; he was

¹⁰⁹ *Id.*, pp. 456, 457.

¹¹⁰ *Supra.*

in the attitude of accepting a gift pure and simple, but that gift was made in reliance upon a promise given in his behalf. Can he violate the promise and fairly take that which came to him solely on account of the promise, even if it was not made or authorized by him? We think not, because his title came through the promise, and by accepting the gift he ratified the promise. He must repudiate the gift or accept the responsibility. While the cases are not uniform, the weight of the authority sustains this conclusion."¹¹¹

In *Winder v. Scholey*¹¹² the reasoning of the New York court in *Amherst College v. Ritch* was adopted. But, for that reasoning to apply, the promise made by one tenant in common must not be for himself alone. If it is, he alone will be deemed a trustee because of the retention of the property in breach of that promise.¹¹³

The policy of enforcing constructive trusts where a legacy or devise or intestate succession is secured by oral promises which are broken. — In concluding this discussion of bequests, devises, and intestacies obtained on oral promises, a word should be said about the wisdom of enforcing constructive trusts in such cases. In *Bedilian v. Seaton*,¹¹⁴ where there seems to have been good ground to refuse to

¹¹¹ *Id.*, pp. 327-328. In *Edson v. Bartow*, *supra*, 221, the court said of *Amherst College v. Ritch*, *supra*, that "we held that Bulkley by accepting the gift ratified the promise made in his name." A late case following these cases is *Golland v. Golland*, *supra*.

¹¹² *Supra*.

¹¹³ *Edson v. Bartow*, *supra*. In *Simons v. Bedell*, 122 Cal. 341, 55 Pac. 3 (1898) a trust was enforced against the heirs of the intestate under rather unusual circumstances. During the last illness of intestate, her father persuaded her to deed a piece of land in New York to her mother and not to make a will disposing of a piece of land in Los Angeles, by a promise that if she would deed the New York piece to the mother, then the father and mother, who with intestate's husband were her sole heirs at law, would convey the Los Angeles piece to the intestate's husband. The court held that while the father was not the agent of the mother in making the promise, the mother could not keep the New York property deeded to her except on the condition stated by the grantor. The court intimated that the mother could keep the interest in the Los Angeles property which intestate intended that she should convey to intestate's husband (or rather its proceeds, for it had been sold by order of court), if she chose to give up the New York property to the estate of intestate, saying: "Equity and good conscience demand that the defendants Bedell either convey the New York property to the estate of [intestate] Jennie Simons, deceased, or relinquish all claim upon the proceeds of the Los Angeles property." (p. 348). The opinion, — one by a Supreme Court Commissioner, — is inadequate, but the decision presents the interesting problem of a promise by one of two out of three prospective tenants in common, — here as heirs at law, — made for the second without authority and in favor of the third.

¹¹⁴ *Supra*.

enforce a constructive trust, as there was nothing to show that intestacy was induced by the promise, Grier, J., expressed his dislike of the doctrine that constructive trusts will be enforced for retention of legacies or devises or intestate succession in breach of oral promises in the following language (p. 287):

"After forty years' experience at the bar and on the bench, I must say that I think courts had better never have relaxed the stringent rule of these statutes [of frauds, wills, and descents]. Courts, as well as juries, are too apt to be led away by the cry of 'Fraud'! We all hate fraud and are too willing to assume the functions of an overruling Providence and punish it by arbitrary power. This feeling of virtuous self-complacency too often leads to hasty decisions and dangerous precedents. I have known a valuable property converted into a trust by the testimony of an old woman who recollected and construed a *nod*, after some twenty-two years, into the acknowledgment of a trust. See *Jones v. McKee*, 3 Barr (Pa.) 496."

No doubt there are occasional miscarriages of justice under the constructive-trust doctrine, but they are far fewer than would take place if fraudulent retention were not remedied under that doctrine. When it is remembered that no promise will be regarded that does not call unquestionably for performance,¹¹⁵ that failure to perform the promise must be clearly shown,¹¹⁶ and that the court must be satisfied that the testator or intestate relied on the promise,¹¹⁷ there seems to be no occasion to fear that any appreciable number of constructive trusts have been raised, or will be raised unwarrantably.¹¹⁸

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¹¹⁵ See *Orth v. Orth*, *supra*; *Allman v. Pigg*, 82 Ill. 149 (1876).

¹¹⁶ *Sparks v. De La Guerra*, 14 Cal. 108 (1859).

¹¹⁷ *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240 (1901); *Tyler v. Stitt*, *supra*. Cf. *Campbell v. Brown*, *supra*; *Mead v. Robertson*, *supra*. But, doubtless, where the express or tacit promise is clearly proved, there is a *prima facie* presumption that the testator would not have made the will or would have revoked or modified it, or that the intestate would have made a will, but for the promise. See *DeLaurencel v. DeBoom*, *supra*, 586.

¹¹⁸ That the evidence must be clear, cogent, and convincing is the accepted rule in this class of cases. *Grant v. Bradstreet*, *supra*; *Stone v. Manning*, 103 Tenn. 232, 52 S. W. 990 (1899).

ADDENDUM

Through the oversight of the writer a note intended for the end of the sentence just before n. 10 on page 241, *ante*, was misplaced until too late for its insertion there. It seems worth while to insert it here even though it consists mainly of a quotation.

In *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578 (1890-1891), a voluntary covenant to pay a sum of money six months after the death of the covenantor was enforced against the executors of the covenantor despite their objection that it was in effect a will. In passing on the question, Mr. Justice Holmes said:

"The truth is that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition for his property, but a contract which is put into the hands of the adverse party and from which the contractor cannot withdraw stands differently. See *Perry v. Cross*, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee."

THE EFFECT OF THE FEDERAL "ANTI-TRUST LAWS" ON COMMERCE IN PATENTED AND COPYRIGHTED ARTICLES

THE Clayton Anti-Trust Act which went into effect Oct. 15, 1914,¹ restricts the making of "tying contracts," affecting: "goods, wares, merchandise, machinery, supplies, or other commodities, *whether patented or unpatented.*"

The insertion of the words "whether patented or unpatented" injects further interest into a subject which has claimed much recent attention before the United States Supreme Court.

The purpose of the patent and copyright laws is to create monopolies. The purpose of the "Anti-Trust Laws" is to restrict them. Obviously there is a line where the operations of the two groups of statutes must come into contact, if not into conflict. These two questions are therefore presented:

First: Exclusive of the Clayton Act, does the fact that a monopoly, combination, or agreement alleged to be in unlawful restraint of trade, involves the use of patented or copyrighted commodities, cause it to be judged by a standard different from that governing other situations, and if so, to what extent?

Second: If such a different standard exists, how far has it been affected by the Clayton Act?

I

THE STATUS OF THE LAW BEFORE THE CLAYTON ACT

The Sherman Act² provides that:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal. . . .

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to

¹ PUBLIC ACTS No. 212, 63d Congress, § 3.

² 26 STAT. AT L. 209.

monopolize any part of . . . trade or commerce . . . shall be deemed guilty of a misdemeanor. . . ."

The other federal "Anti-Trust Laws"³ apply to imports and are in substantially similar form. Into this language must be read the principle of the *Standard Oil and Tobacco* and some later cases⁴ that the laws are to be interpreted in the "light of reason" and that only "undue" restraint of commerce is prohibited.

Conferring the right to create patents and copyrights, the Constitution of the United States⁵ gives to Congress the power "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Pursuant to this, Congress has granted⁶ to every patentee for the term of seventeen years "the exclusive right to make, use, and vend the invention or discovery."

To holders of copyrights it has granted⁷ for the term of twenty-eight years the sole liberty of "printing, reprinting, publishing, completing, copying, executing, finishing, and vending" their works.

There is no doubt that a combination or contract may be unlawful under the Sherman Act, though it relates to either patented or copyrighted commodities.⁸ Nevertheless the element of patents and copyrights is important at times in determining whether that act has been violated. At least three decisions of the United States Supreme Court⁹ and two decisions in the

³ Act of Aug. 27, 1894, 28 STAT. AT L. 570, §§ 73-77, and amendment of Feb. 12, 1913, 46 STAT. AT L. 667.

⁴ *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911); *United States v. Union Pacific R. R. Co.*, 226 U. S. 61 (1912).

⁵ ART. I., § 8.

⁶ REV. STAT., § 4884.

⁷ REV. STAT., § 4952.

⁸ *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48, 49 (1912); *Straus v. American Publishers' Association*, 231 U. S. 222 (1913); *United States v. Patterson*, 205 Fed. 292 (1913); *Blount Mfg. Co. v. Yale, etc. Co.*, 166 Fed. 555 (1909); *National Harrow Co. v. Hench*, 83 Fed. 36 (1897), 84 Fed. 226 (1898); *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155 (1905); *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224 (1891); *National Harrow Co. v. Bement*, 47 N. Y. Supp. 462 (1897); *Attorney-General v. National Cash Register Co.*, 148 N. W. 420 (Mich., 1914); *Mines v. Scribner*, 147 Fed. 927 (1906).

⁹ *United States v. Winslow*, 227 U. S. 202 (1913); *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373 (1911); *Bement v. National Harrow Co.*, 186 U. S. 70 (1902).

Circuit Court of Appeals¹⁰ lend themselves inevitably to this conclusion.

*United States v. Winslow*¹¹ was a direct criminal prosecution by the government of certain defendants who, before combining, had separately under letters patent made almost all of the machines used in manufacturing shoes. They organized a new corporation, turned over to it all their stocks and business and ceased to sell machinery, but continued to let machines on condition that the lessees use the lessor's machines exclusively. Partially on the ground that the defendants had previously not been competing, and without deciding whether the leasing of machines was valid, the court dismissed the indictments. As a part of its reason however for so doing, it emphasized strongly the fact that the machines were patented. Justice Holmes said:¹²

"The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case*, 210 U. S. 405. . . ."

*Dr. Miles Medical Co. v. Park & Sons Co.*¹³ was a suit to enjoin a retailer of medicines manufactured by secret processes from violating one of a series of agreements with retailers restricting prices. The defense was the Sherman Act. It was urged that the restrictions of prices were valid because the agreements related to secret processes. The court held the agreements invalid, basing its decision almost wholly upon the distinction between the rights of owners of secret processes and the rights of owners of patents.

In *Bement v. National Harrow Co.*¹⁴ suit was brought to enforce the payment of royalties under a license agreement, which was the only one of a series of several contemplated agreements that was actually executed. The defense here also was the Sherman Act, but the court upheld and enforced the agreement. It expressly refused to decide whether the proposed system of controlling the trade would have been valid if all the contracts had been executed, but the court, through Justice Peckham, said:¹⁵

¹⁰ *Rubber Tire Wheel Co. v. Milwaukee Rubber W. Co.*, 154 Fed. 358, Seventh Circuit (1907); *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364, Ninth Circuit (1903).

¹¹ 227 U. S. 202.

¹² *Idem*, p. 217.

¹³ 220 U. S. 373.

¹⁴ 196 U. S. 70.

¹⁵ *Idem*, p. 88.

"This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it."

It is somewhat difficult to distinguish in principle the facts in *Rubber Tire Wheel Co. v. Milwaukee Rubber W. Co.* and *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.* (*supra in note*) from those in the *Bathtub Trust Case*,¹⁶ where the Supreme Court later found an illegal combination to exist. A feature which may be material is that the *Bathtub Trust Case* involved licenses for the use of a patented tool used in manufacturing processes, while the other cases involved licenses under patents actually used in commodities of commerce. In both of the Circuit Court of Appeals cases the combinations were upheld as valid and great emphasis in each instance was laid on the fact that they were combinations dealing in patented articles. Each involved a system of license agreements and an extensive plan for controlling prices and discounts. The *Rubber Tire Wheel Company Case* involved licenses under a single patent and the *Raisin Case* involved licenses under a number of patents. The *Bathtub Trust Case* involved licenses under a single patent, though other infringing patents had been bought up and suppressed. It is worth while to consider the forceful argument of the Circuit Court of Appeals in the *Rubber Tire Wheel Company Case*, where it said:¹⁷

"Plaintiff, as his successor in interest, is the owner of a valid patent. That stands as an unquestionable fact on this writ of error. The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or

¹⁶ Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20.

¹⁷ 154 Fed. 358, 363.

conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. *Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing?* If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, depriving them of something to which they have a right? *Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly?* To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured." (The italics are ours.)

It is perhaps unfortunate that, although the Supreme Court of the United States granted a writ of *certiorari* to review this decision,¹⁸ the cause was later dismissed by stipulation.¹⁹

In 1904 the Court of Appeals of the State of New York, when *Straus v. American Publishers' Association* was first presented to it,²⁰ held that a combination among publishers owning many different copyrights, attempting to limit prices and sales of books, was valid with respect to copyrighted works, and was invalid with respect to those not copyrighted. The distinction was based solely upon the existence of the copyrights, and two dissenting opinions of Judges Gray and Bartlett were rendered only because they considered the agreement valid also with respect to the uncopyrighted books. This case came before the New York Court of Appeals again in 1908²¹ on a certified question in which the element of the uncopyrighted books was eliminated, and the court again held that the combination was lawful. The Supreme Court of the United States, however, reversed the New York Court of Appeals on the ground that the monopoly of the combination transcended the rights created by the copyright laws.²²

The Supreme Court in this case and in the *Bathtub Trust Case* (*supra*) states clearly that there is a point beyond which the patent and copyright laws have no protective force. In the former it said regarding the license agreements under consideration:²³

¹⁸ 207 U. S. 589 (1907).

²⁰ 177 N. Y. 473, 69 N. E. 1107.

²² 231 U. S. 222 (1913).

¹⁹ 210 U. S. 439 (1908).

²¹ 199 N. Y. 548, 93 N. E. 1133.

²³ 226 U. S. 20, 48.

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. . . .

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation on rights which may be pushed to evil consequences and therefore restrained."

In the *Straus Case* the Court said:²⁴

"No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies."

Through all these cases can be traced two principles: first, that the "Anti-Trust Laws," except the Clayton Act at least, do not restrict the patent or copyright laws, do not trespass upon the domains of the monopolies legalized by them; and, secondly, that beyond those limits, situations are to be judged under the "Anti-Trust Laws" exactly as though the element of patents or copyrights were not involved. This is apparently the theory of the Circuit Court of Appeals in the *Rubber Tire Wheel Company Case*, where it said:²⁵

"Congress, having created the patent law, had the right to repeal or modify it in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; *the necessary implication is not that one iota was taken away from the patent law. . . .*" (The italics are ours.)

It is consistent with the statement (*supra*) in the *Bathtub Trust Case* that patents do not give "an universal license against positive prohibitions," and with the statement (*supra*) in the *Straus Case* that the Sherman Act is designed to reach "all combinations in unlawful restraint of trade and tending *because of the*

²⁴ 231 U. S. 222, 234.

²⁵ 154 Fed. 358, 362.

agreements or combinations entered into to build up and perpetuate monopolies."

The *Bathlub Trust Case*, therefore, was decided in favor of the government, not with the intent to clip away parts of the territory of patent monopolies, but because the combination in that instance "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it." The United States Supreme Court reversed the New York Court of Appeals in the *Straus Case*, not with an intent to take away any rights created by the copyright laws, but because the New York Court of Appeals had exaggerated the inherent scope of monopoly which the copyright laws create. The parties charged with violating the Anti-Trust Acts in the *Winslow* and *Bement* cases were exonerated, not because the "Anti-Trust Laws" cannot affect patented commodities at all, but because the transactions in those cases were all within the authorized scope of the patent monopoly. In the *Dr. Miles Medical Company Case* the contrast was drawn between secret processes and patents, because if the transactions had concerned patents, they might have been within the scope of the patent monopoly, but the implication is not that there would have been absolute immunity. So, also, in the other cases, though it is not clearly stated in all the opinions, the important underlying question was whether the transactions were within the limits of the legalized monopolies created by the patent or copyright laws.

The adoption of this theory by no means solves all the difficulties of the situation. The extent of the inherent limitations of the legalized monopolies is still a matter of perplexing complexity. If, however, that problem can be approached from the point of view of endeavoring to determine the extent of rights created by the patent and copyright laws, and not with a lurking suspicion of some encroachment upon those rights by the "Anti-Trust Laws," much confusion of thought can be avoided.

Our conclusions as to the status of the law before the Clayton Act took effect can be summarized as follows:

First: Except the Clayton Act, the "Anti-Trust Laws" do not restrict the monopolies created by the patent and copyright laws.

As corrolaries to this it follows:

A. The extent of patent and copyright monopolies should be judged solely with reference to the laws creating them and wholly independent of any operation of the "Anti-Trust Laws."

B. Out of the possible field of operation of the "Anti-Trust Laws" is definitely carved the complete field of patent and copyright monopolies.

C. If a patent is sufficiently broad to cover a whole industry, it is not a violation of the "Anti-Trust Laws" for its owner completely to monopolize that industry.

D. Licenses under a single patent, so long as they are of the character authorized by the patent laws, are valid, no matter how numerously multiplied.

Second: Beyond the *inherent limitations* of their monopolies, patents and copyrights have no protective force in determining whether the "Anti-Trust Laws" have been violated.

It is certain that there is no absolute guarantee of protection where:

(1) The combination or agreements in question relate to several different patents or copyrights originally acquired by more than one person.²⁶

(2) It is expressly provided that the combination or agreements shall extend beyond the life of the patents or copyrights.²⁷

(3) Agreements seeking to control an entire industry are put in the form of "license agreements" under a patent which obviously does not naturally cover the whole industry.²⁸

II

THE EFFECT OF THE CLAYTON ACT²⁹

The Second Section of the Clayton Act is directed against unfair discriminations in prices between different purchasers of commodities. It provides:

²⁶ National Harrow Co. v. Hench, 83 Fed. 36, 84 Fed. 226; Bobbs-Merrill Co. v. Straus, 139 Fed. 155; 1 Page on Contracts, p. 698; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581 (1892).

²⁷ National Harrow Co. v. Bement, 47 N. Y. Supp. 462.

²⁸ See Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20.

²⁹ "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for other Purposes." PUBLIC ACTS No. 212, 63d Congress, H. R. 15657.

"Sec. 2: That it shall be unlawful for any person . . . to discriminate in prices between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities, made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bonâ-fide* transactions and not in restraint of trade."

The Third Section applies to what are known among merchants as "tying contracts" and provides:

"Sec. 3: That it shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities *whether patented or unpatented* . . . or fix a price charged therefor, or discount from or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (The italics are ours.)

These sections have probably not made any radical change in the law. By their terms they only operate where the effect of the transactions to which they apply "may be to *substantially lessen competition or tend to create a monopoly*." But the Sherman Act already had the effect of prohibiting *all* contracts and attempts to monopolize commerce, which amounted to an "undue" or "unreasonable" restraint of trade, and the new test does not seem to differ greatly from the old one. Almost the exact words of the Clayton Act were used in *Whitwell v. Continental Tobacco Co.*, where the Circuit Court of Appeals for the Eighth Circuit was considering squarely the propriety of a "tying contract" and said:³⁰

³⁰ 125 Fed. 454, 457 (1903).

"[That the purpose of the Sherman Act] was to prevent the stifling or *substantial restriction of competition*, and the test of the legality of a combination under the Act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect *is to stifle or to directly and substantially* restrict free competition, it is a contract, combination, or conspiracy in restraint of trade and it falls under the ban of the law." (The italics are ours.)

The sections have, however, at least put the test into statutory form, and the very fact that there are now specific provisions against "tying contracts" and price discrimination will undoubtedly cause them to be scrutinized with greater care.

The insertion of the words "whether patented or unpatented" in Section 3 presents two interesting questions:

First: Has this specific reference to patents made the law larger than it would have been had the words been omitted?

Second: Is any significance to be attached to the omission of specific reference to copyrighted commodities in this section, and to either patented or copyrighted commodities in Section 2?

The first question is academic except for its bearing upon the second. There is no doubt that "tying contracts" relating to patented commodities are prohibited if their "effect may be to substantially lessen competition or tend to create a monopoly." The Act says so. If, however, they would not have been but for the express mention of patented commodities, then immediately the maxim *expressio unius est exclusio alterius* is suggested to us, and the question arises whether copyrighted commodities are impliedly excluded from Section 3, and whether either patented or copyrighted commodities are covered by Section 2.

Certainly copyrighted productions are, at least in some instances, "commodities."³¹

³¹ See *Barataria Canning Co. v. Jouliau*, 80 Miss. 555, 31 So. 961 (1902); *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871 (1895); *Beechley v. Mulville*, 102 Ia. 602, 70 N. W. 107 (1897); *S. S. White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 35, 98 N. E. 1056 (1912); *Alpaca Co. v. Commonwealth*, 212 Mass. 156, 98 N. E. 1078 (1912); *Century Dictionary & Encyclopedia*, vol. II, p. 1132; *State v. Frank*, 169 S. W. 333 (Ark., 1914); *Amer. League Baseball Club of Chicago v. Chase*, 149 N. Y. Supp. 6 (1914); *State v. Chicago, R. I. & P. Ry. Co.*, 95 Ark. 114, 128 S. W. 555 (1910); *Rohlf v. Kasemeier*, 140 Ia. 182, 118 N. W. 276 (1908); *Queen Ins. Co. v. Texas*, 86 Tex. 250, 24 S. W. 397 (1893).

It is not a sufficient answer to say that both Sections 2 and 3 prohibit "any person" from doing the acts to which they refer. The language of the Sherman Act applies to "every person who shall monopolize or attempt to monopolize . . . any part of trade or commerce. . . ." Literally construed, the Act would have abolished patent and copyright monopolies completely.

Section 3 applies to both patented and copyrighted commodities for at least two reasons. In the first place it would be quite arbitrary to apply it to one and not to the other. The maxim *expressio unius est exclusio alterius* does not create an inflexible rule. It is always subjected to the intent to be gathered from the statute as a whole.³² It does not operate where the specific mention is by way of illustration only.³³ Section 3 applies to a restricted and specific class of transactions. There is no evidence elsewhere in the statute of an intent to except from its operation any commodities. The reference to patented commodities indicates rather an intent not to overlook any.³⁴ Although the Supreme Court has said that the rules applicable to patents under the "Anti-Trust Laws" do not necessarily govern copyrights,³⁵ the distinction is not material in this connection.

In the second place there is no reason for reading copyrighted commodities out of Section 3, as there was for reading patented and copyrighted commodities to a certain extent out of the Sherman Act. Assuming that the section applies to all commodities, it takes away no rights created by the patent or copyright laws. Those laws do not confer the right to make "tying contracts." Whatever rights the owners of patents and copyrights had to make such contracts before the Clayton Act, were rights existing by virtue of the common law. A "tying contract" relating to patented commodities was upheld in *New York Bank Note Co.*

³² *Johnson v. Southern Pac. Co.*, 196 U. S. 1 (1904); *State v. Standard Oil Co.*, 61 Ore. 438, 123 Pac. 40 (1912); *Lewis' Sutherland Stat. Cons.*, 2 ed., vol. II, p. 925.

³³ *Scaggs v. Baltimore & Washington R. R. Co.*, 10 Md. 268 (1856); *Brown v. Buzan*, 24 Ind. 194 (1865); *Park v. Soldiers & Sailors Home*, 22 Colo. 86, 43 Pac. 542 (1896); *Lewis' Sutherland Stat. Cons.*, 2 ed., vol. II, p. 925.

³⁴ The words were not in the draft of the Act originally reported to the House by Mr. Clayton from the Committee on the Judiciary. Report 627, 63d Congress, 2d Sess. to accompany H. R. 15657.

³⁵ *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155.

v. *Hamilton Bank Note Co.*,³⁶ but for the reason that the contract was not "unreasonable in its restraint of trade," and not because the patents laws authorized such a contract.

Section 3, therefore, given its fullest possible force, operates only outside the "inherent limitations" of the patent and copyright monopolies. If it takes away any rights, they are common-law rights. If it produces any novel effects, it affects contracts relating to all commodities alike. The specific reference to patented commodities was not necessary to accomplish that result.

The situation regarding Section 2 is somewhat, but not entirely, the same. Would that section, if applied literally and fully to patented and copyrighted commodities, trespass upon rights created by the patent and copyright laws? Those laws do expressly confer the right "to vend" productions. The right "to vend" has been interpreted to include the right to fix prices. The Supreme Court in *Bement v. National Harrow Co.* said:³⁷

"The owner of a patented article can, of course, charge such price as he may choose."

Both before and since the Clayton Act he undoubtedly has had the right to "choose," within certain limits at least, to charge one purchaser one price and another a different price. Is not this right, however, merely a common-law right which he has enjoyed in common with all other traders except common carriers and other persons charged with a public service? Is it not the same right described by the Circuit Court of Appeals in *Whitwell v. Continental Tobacco Co.*,³⁸ where it said, regarding a trader who was not dealing in patented or copyrighted commodities:

"The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. . . . They [the defendant and its employee] had the right to select their customers, to sell and to refuse to sell to whomsoever they choose, and to fix different prices for sales of the same commodities to different persons."

Unless the right to discriminate in prices is necessary to protect the patent or copyright monopoly, the owner of copyrights or

³⁶ 180 N. Y. 280, 73 N. E. 48 (1905).

³⁷ 186 U. S. 70, 93.

³⁸ 125 Fed. 454.

patents never has had any rights of this character greater than anyone else; the Sherman Act affected him exactly as it did all others in this respect, and Section 2 of the Clayton Act, if applied to him, does not infringe any of his statutory rights.

Whether the patent and copyright monopolies include in their scope peculiar rights to discriminate in prices is, however, a question not yet completely answered by the courts. If they do, then to the extent of those peculiar rights there is the same reason for exempting patented and copyrighted commodities from the operation of Section 2 that there was in exempting them from the Sherman Act. Furthermore, by its terms the section only operates when the "*effect of such discrimination* may be to substantially lessen competition or tend to create a monopoly." To the extent that the patent or copyright laws are the moving cause which produces this effect, the section, by its own language, is inoperative.

Section 2, therefore, applies to both patented and copyrighted commodities, but, like Section 3 and like the Sherman Act, it operates only outside of their "inherent limitations."

Our conclusions regarding the effect of the Clayton Act can be summarized as follows:

First: The Act in setting up the new test whether the effect of the transactions prohibited "may be to substantially lessen competition or tend to create a monopoly" does not change greatly, if at all, the old test of whether there was "unreasonable" or "undue" restraint of trade. The existence of a specific statute covering price discrimination and "tying contracts" will, however, cause such transactions to be scrutinized with care.

Second: Sections 2 and 3 apply to both patented and copyrighted commodities. Section 3, at least, takes away no rights created by the patent and copyright laws, and Section 2 should be construed as operating only outside the scope of the monopolies created by those laws. The insertion of the words "whether patented or unpatented" in Section 3 was unnecessary.

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THE ENGLISH MORATORIUM IN A NEUTRAL STATE. — The influence of the European war on neutral America has many interesting side-lights. One striking illustration of the interdependence of the commercial communities on both sides of the Atlantic is afforded by a recent dispute between New York merchants over the effect of the English moratorium, a sort of measure which prior to August, 1914, seems to have been unheard of in English and American law. An opinion was given by the Hon. Edgar M. Cullen, formerly Chief Justice of the New York Court of Appeals, to whom the matter was referred as arbitrator. *In the Matter of the Arbitration Agreement between Lazard Frères and L. Vogelstein & Co.*, 52 N. Y. L. J. 801. Before the war, a New York banking house made a loan of bills of exchange drawn upon its London correspondents. The borrowers agreed to refund three days before the maturity of the bills in London, at the then prevailing rate of exchange on London. The bills fell due after the outbreak of war, but the acceptors did not take advantage of a moratorium which had been proclaimed,¹ and paid them at maturity. The question was whether the New York banker could hold the borrower liable on his contract at the extremely high rates of exchange then prevailing.

¹ This was the Royal Proclamation of August 2, 1914 (No. 1164). THE POSTPONE-MENT OF PAYMENTS ACT, ratifying the proclamation and authorizing them in the future, became law on August 3 (4 & 5 Geo. V, c. 11), the second time in English history that a statute has passed through all its stages and become law in a single day. 58 Sol. J. 758, 759.

It was held that he could. The acceptors, who had been supplied with funds to meet the bankers' accruing obligations, were not bound to invoke the moratorium in order that the borrowers might secure the benefit of a possibly lower rate of exchange in the future.

No decision involving this point has been found in the rapidly increasing number of reported English cases dealing with various phases of the recent moratoria, but the result seems to be in accordance with the spirit of the act. It was an emergency measure for the benefit of debtors. They were not obliged to accept its privileges. Indeed, a moratorium proclamation subsequent to the one here in dispute expressly provided that payments before the expiration of this special period of grace were not forbidden.²

WIDER JURISDICTION FOR THE UNITED STATES SUPREME COURT. — A recent amendment to the Federal Judicial Code gives the Supreme Court jurisdiction to review *all* cases involving a federal right which have been carried to the state court of last resort for such questions.¹ Hitherto the right of review in such cases has been limited to decisions adverse to the federal right. This is a significant victory for legal reform, won by the American Bar Association after a single-handed fight, with practically no assistance from the press.² Congress was reluctant to extend the jurisdiction which had remained substantially without change since the Judiciary Act of 1789,³ but new conditions bringing new problems have supplanted those which gave rise to the old rule, and it had become a positive obstacle to a just and uniform interpretation of the federal Constitution.

The jurisdiction conferred upon the Supreme Court by the Judiciary Act was wide enough to restrain local jealousies and to preserve the newly created central authority from encroachment by the states. No more was necessary. If a state court in that day and generation sustained a federal right, it would be practically certain to prevail in the Supreme Court also. The denial of an appeal in such cases was a wise measure to prevent fruitless litigation.

To-day the most important disputes arising under the Constitution no longer turn upon conflicts between the states and the national government, but between the states and their own citizens. The state judiciary no longer harbors a local jealousy of central authority. But many state judges, clinging tenaciously to an outworn economic creed, are likely to regard as offending the Fourteenth Amendment humanitarian legislation which the Supreme Court would sustain if the case

² Proclamation of Sept. 30, 1914, s. 4. 58 Sol. J. 854.

¹ PUBLIC ACT No. 224; 63d CONGRESS, SENATE BILL No. 94; Approved Dec. 23, 1914, amending FED. JUD. CODE OF 1911, c. 10, § 237.

² The measure was proposed in the report of a special committee of the American Bar Association in 1911, which was adopted without change by the Association. 36 A. B. A. 462, 469, 48. It was passed by the Senate in the 62d Congress, but not by the House. 37 A. B. A. 559, 564; 38 A. B. A. 547.

³ Sec. 25.

could be appealed.⁴ Under the code as it stood prior to the recent amendment, no such appeal could be taken. This injustice was not certain to be removed even if the Supreme Court definitely affirmed the validity of a similar statute on appeal from the court of another state which happened to rule against the federal right. At least one state court expressly declared: "We are not bound by any obligation imposed upon us in the federal Constitution to uphold a state statute merely because, in the view of the Supreme Court of the United States, it is not unconstitutional."⁵ Thus the rule which has been superseded made possible a situation in which one "supreme law of the land" would have, permanently, a different meaning in different parts of the land. Moreover, it was conceivable that the Supreme Court would never have a chance to pass upon legislation which all the state courts held invalid.

The new amendment gives the Supreme Court a *discretionary power* to review by *certiorari*, or otherwise, decisions which sustain the federal right. If the decision is adverse to the federal right the losing party may still demand a writ of error from the Supreme Court *as of right*. The slight difference in procedure enables the court to free its calendar from dilatory appeals under the new jurisdiction, without impairing the position which is now assured to it as the final interpreter of the Constitution.

DIRECT RECOVERY BY A CORPORATION FOR DAMAGE SUSTAINED AS STOCKHOLDER IN ANOTHER CORPORATION. — Can a shareholder, the value of whose stock had been depreciated by a wrongful reduction of the corporate assets, circumvent the long-established principle that a stockholder cannot sue for damage to his interest caused through injury to the corporation for which the latter has a right of action,¹ by showing that the wrongdoer was simultaneously violating a duty owed the shareholder in his individual capacity? This question received its first judicial consideration in a decision just handed down by the Appellate Division of the New York Supreme Court. *General Rubber Co. v. Benedict*, 164 N. Y. App. Div. 332, 149 N. Y. Supp. 880.² The plaintiff corporation was a large stockholder in another corporation, and defendant was a director of the former but not of the latter. With

⁴ Many interesting examples of this have been collected by Professor W. F. Dodd in an article entitled, "The United States Supreme Court as the Final Interpreter of the Federal Constitution," 6 Ill. L. Rev. 289. Cf. *State v. Williams*, 189 N. Y. 131 (1907), with *Muller v. Oregon*, 208 U. S. 412 (1908); and *People v. Orange, etc. Co.*, 175 N. Y. 84 (1903), with *Atkin v. Kansas*, 191 U. S. 207 (1903).

⁵ See *McCullum v. McConaughy*, 141 Ia. 172, 176, 119 N. W. 539, 540.

¹ *Smith v. Hurd*, 12 Met. (Mass.) 371, is the leading case. A stockholder brought an action on the case against certain directors for negligently permitting the corporate assets to be wasted. A demurrer to the declaration was sustained.

Other cases involving the same principle are *Smith v. Poor*, 40 Me. 415; *Allen v. Curtis*, 26 Conn. 456; *Converse v. United Shoe Machinery Co.*, 185 Mass. 422, 70 N. E. 444; *Niles v. Johnson*, 69 N. Y. App. Div. 144, 74 N. Y. Supp. 617, affirmed 176 N. Y. 119, 68 N. E. 142. See 1 MORAWETZ, CORPORATIONS, 2 ed., §§ 239, 566; 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4550-1; 22 HARV. L. REV. 594.

² This case is more fully stated in this issue of the REVIEW, p. 427. The opinion was by Dowling, J., in which Scott and Hotchkiss, JJ., concurred. There was a dissenting opinion by Ingraham, P. J., in which Laughlin, J., concurred.

defendant's acquiescence and connivance the manager of the latter misappropriated a large part of its assets to the use of still another company of which defendant and he were part owners. A demurrer was overruled to a complaint based on violation of defendant's duty as director.³

The true purport of this adjudication appears from a review of the reasons underlying the rule of *Smith v. Hurd*.⁴ Where the corporation has been injured, it is primarily for its directors to proceed against the wrongdoer, but should they fail to act, the shareholder has his ultimate remedy by a bill in equity to require the assertion of the corporate right.⁵ Although the shareholder has suffered indirect harm to the value of his stock, if it was through negligence of the defendant, as in *Smith v. Hurd*, he has no cause of action in his own name, because the law of torts does not recognize as a basis for recovery indirect negligent injury of this sort through direct damage to a third person.⁶ But where, as in the principal case, the indirect injury is intentional, ordinary principles of tort liability would seem to afford direct relief.⁷ Yet a universal exception is to be found where a tortfeasor interferes with a debtor's assets to the detriment of creditors. In such cases the sole cause of action is in the debtor.⁸ This qualification is attended by eminently desirable results of convenience. Not only would each petty creditor with his trivial claim be a potential litigant, but also the estimation of damages in a given suit would necessitate adjudicating the extent and sufficiency of the claim of all individual creditors who might have participated in the assets destroyed. In corporation cases the reasons for making an exception are equally cogent, for not only might each holder of a single share sue for any wrongful depreciation, however trifling,⁹ but, inasmuch as the rights of creditors

³ At the outset it is best to concede that there was a violation of defendant's duty as director in not notifying plaintiff. The dissent intimates that the director's duty did not extend to plaintiff's interest in this subsidiary corporation. This view, it is submitted, places too low an estimate upon the duties of directors. Business morality demands that all a corporation's interests be protected. On the question of a director's duties arising out of his fiduciary position, see 1 MORAWETZ, CORPORATIONS, 2 ed., §§ 516 *et seq.*; 2 THOMPSON, CORPORATIONS, 2 ed., §§ 1215-22.

⁴ *Supra*, n. 1.

⁵ With reference to bringing a shareholder's bill, see 1 MORAWETZ, CORPORATIONS, 2 ed., §§ 240-1; 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4553-9; 22 HARV. L. REV. 594. See *Hawes v. Oakland*, 104 U. S. 450; *Smith v. Poor*, *supra*.

⁶ See 28 HARV. L. REV. 307.

⁷ See *ibid.* It would seem incontrovertible that the wrongdoer in misapplying the corporate funds must have had in mind, and intended, a depreciation in the value of the shares.

⁸ *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Bradley v. Fuller*, 118 Mass. 239; *Adler v. Fenton*, 24 How. (U. S.) 407; *Klous v. Hennessey*, 13 R. I. 332.

⁹ This reason alone would not explain the cases denying relief to a sole shareholder. *Fitzgerald v. Missouri Pacific Ry. Co.*, 45 Fed. 812; *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729; *Cutshaw v. Fargo*, 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650.

Shaw, C. J., in *Smith v. Hurd*, *supra*, 383, says, "If an action can be brought by one stockholder, it may be brought by the holder of a single share; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty, in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance

are paramount to the shareholder's interests,¹⁰ the merits of each claim against the corporate assets would have to be collaterally determined to ascertain how much, if any, plaintiff has been damaged. In short, a thorough accounting of the corporation's finances would be in order. On the other hand, let the corporation itself sue, and the amount recovered be paid into its treasury: procedure will be simple, and the result equitable. This alone should be sufficient relief for the stockholder.

Nevertheless, if by reason of some collateral facts the shareholder is independently entitled to legal protection against this indirect harm, should that enable recovery for injury which primarily affects the property of another legal unit? The Appellate Division gives an affirmative answer where the shareholder is independently entitled by virtue of the relationship of corporation and director, which imposed a duty on the director not to connive at waste of assets of another corporation in which the plaintiff is a shareholder. Analogous cases would be those of *cestui* and trustee, agent and principal, and cases where the director expressly contracted with a stockholder not to waste corporate assets. Yet do not considerations of convenience continue to operate against recovery? The same comprehensive financial investigation would be necessary to ascertain this plaintiff's award. Likewise nothing could deter actions by such other shareholders as could invoke the benefit of the doctrine of this case, or by the subsidiary corporation itself in its own right based on defendant's connivance in the defalcation, certainly on behalf of creditors and uncompensated shareholders, if not for the whole extent of the wrong.¹¹

The principal case thus presents circumstances to which the rule of *Smith v. Hurd* could profitably be extended. Perfect justice would be attained with relative facility by requiring that the plaintiff make the subsidiary corporation a party in any action he brings, and thus its rights, and consequently the derivative rights of shareholders and creditors, would be fully and at once adjudicated. These considerations would not apply, however, to circumstances less fortunate for the subsidiary corporation under which it would be remediless against this defendant, as, for instance, had he merely acquiesced, instead of concluded, in the misappropriation. As the plaintiff would then have no derivative redress, it would be unjust not to determine the defendant's liability to him in a direct action, and the difficulty of computing damages should not be heard in defense.¹²

of such negligence, by which the shares are diminished in value fifty, ten, five, or one per cent."

¹⁰ Cf. 2 MORAWETZ, CORPORATIONS, 2 ed., §§ 818 *et seq.*; 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4990 *et seq.*

¹¹ Shaw, C. J., in *Smith v. Hurd*, *supra*, 386: "It is obvious to remark that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation."

¹² It would seem that as an essential element of his complaint plaintiff should aver facts establishing the non-liability of defendant to the subsidiary corporation. Should defendant make a *bonâ fide* denial of such non-liability, the proper procedure apparently would be for the court to stay plaintiff's suit until the corporate right be asserted and tested against defendant. If judgment should be against defendant, this suit would be dismissed. If in his favor, this suit would proceed.

RIGHT TO A NEW TRIAL AFTER THE EXPIRATION OF THE TERM. — Where a man has been convicted of a crime, and later-discovered evidence tends to show that his conviction was improper, either on the merits, or because the jury was prejudiced, one would naturally suppose that he would be granted a new trial. A recent decision of the United States Supreme Court, however, declares that unless the request for a new trial was made before the expiration of the term at which the judgment of conviction was entered, this relief is impossible. *United States v. Mayer*, 235 U. S. 55.¹ In that case, after the end of the term, it was discovered that one of the jurymen who served at the trial had been prejudiced against the defendant. It was nevertheless held that a new trial could not be granted, since with the expiration of the term the court had lost all control over the judgment.

Unquestionably, the general rule at common law was that a judgment could not be altered by the court which granted it after the expiration of the term at which it was granted.² To this rule the law recognized but three exceptions. Clerical errors could be corrected at any time.³ By a writ of *audita querela*, relief might be had against the consequences of a judgment on account of some matter of defense, which had arisen since its rendition, and which could not have been taken advantage of otherwise.⁴ Writs of error *coram nobis* were allowed to bring to the attention of the court errors of fact in the procedure not appearing on the face of the record, unknown to the court, and which if known in season would have prevented the judgment.⁵ These writs were generally limited to situations where, unknown to the court, one of the parties to the judgment had died before it was rendered, or was an infant, a *feme covert*, or insane.⁶ Thus, where the grounds for the relief asked were newly discovered evidence or partiality of the tribunal, the law afforded no remedy.⁷ In such cases, however, equity in its jurisdiction to enjoin judgments obtained through fraud, accident, or mistake would compel a new trial at law to prevent an inequitable use of a legal right.⁸ Modern statutes have to some extent remedied this defect in the law by providing that within a prescribed time, generally one, two, or three years after

¹ For a statement of the case, see p. 434 of this issue of the REVIEW.

² *Bank of United States v. Moss*, 6 How. (U. S.) 31; *Ex parte Sibbald*, 12 Pet. (U. S.) 488; *Phillips v. Negley*, 117 U. S. 665. BLACK, JUDGMENTS, § 306; FREEMAN, JUDGMENTS, § 96. The somewhat elusive reason given for this rule was that "during the term, the record remaineth in the breast of the judges; but when the term is past, then the record is in the roll and admitteth no alteration, averment, nor proof to the contrary." CO. LITT., 260 (a).

³ *Phillips v. Smith*, 1 Stra. 136. This is not a true exception, since the judgment is not altered. The record alone is altered, to make it conform to the judgment in fact rendered.

⁴ 3 BL. COM., 405, 406; see *Avery v. United States*, 12 Wall. (U. S.) 304.

⁵ *United States v. Plumer*, 3 Cliff. 28; *Adler v. State*, 35 Ark. 517; *State v. White*, 75 Mo. App. 257; see *Asbell v. State*, 62 Kan. 209.

⁶ See *Brunsen v. Shulten*, 104 U. S. 410, 416; *Adler v. State*, *supra*; *Howard v. State*, 58 Ark. 229. The more summary method of procedure by motion has now generally taken the place of these old forms. See *Harris v. Hardeman*, 14 How. (U. S.) 334; 3 BL. COM., 406; FREEMAN, JUDGMENTS, § 94.

⁷ Since the error was not in the record, no aid could be obtained from a higher court by appeal or otherwise.

⁸ *Tovey v. Young*, Prec. Ch. 193; *Platt v. Threadgill*, 80 Fed. 192; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; 4 POMEROY, EQ. JUR., 3 ed., § 1364.

the entry of the judgment, the court may on motion grant a new trial on various grounds, generally including prejudice of the jury and newly discovered evidence.⁹ But since these statutes do not as a rule cover criminal cases,¹⁰ and since equity has always refused to interfere in criminal cases where no property rights are involved,¹¹ the defendant in the case under discussion is without redress. His only hope lies in a pardon. This is obviously an inadequate and cumbersome remedy.¹² The executive has not the proper procedure for hearing and determining the merits of the question. From the point of view of the defendant, it is unjust, since he has the burden of proving his innocence to the executive, whereas, until justly convicted, he should be entitled to a presumption of innocence. And, further, he is denied an opportunity to prove that he has been unjustly accused. From the point of view of the state, the defendant should not be set at liberty until an impartial jury has acquitted him on the merits of the case. Thus the granting of a new trial can alone secure the rights of all parties.

Moreover, in this respect a sharp distinction should be noted between civil and criminal cases. In the former, it is clearly to the interest of the community that there be a definite time after which a judgment cannot be altered. Otherwise title to property would be insecure, and business would be unreasonably hampered. In criminal cases, on the other hand, no property rights can be prejudiced by altering the judgment at any time. The state is simply exacting punishment, and the life and liberty of the accused are at stake. It indeed seems a very mockery of justice to deny relief to one thus unjustly convicted on the mere technicality that the term has expired.¹³ This gap in the law has been supplied in England by a statute creating a separate court for criminal appeals and giving to it a wide discretion in granting new trials at any time and on any grounds.¹⁴ It is submitted that such legislation reaches an eminently satisfactory result, and should be followed in the United States.

THE FIVE PER CENT CASE AGAIN.—Seemingly, rate problems, like the heads of the Hydra, are no sooner disposed of than they return two-fold to plague their assailant. Upon a rehearing of the Five Per Cent Rate Case the Interstate Commerce Commission have modified their original decision. *The Five Per Cent Case*, 32 I. C. C. 325.¹ The Com-

⁹ See 4 POMEROY, EQ. JUR., 3 ed., § 1365; *Fuller v. United States*, 182 U. S. 562; KY. CODES, § 344; BURNS' ANNOTATED IND. STATUTES, §§ 585, 587, 589.

¹⁰ See *Klink v. People*, 16 Colo. 467; *Howard v. State*, *supra*.

¹¹ *Kerr v. Corporation of Preston*, 6 Ch. D. 463; *Portis v. Fall*, 34 Ark. 375; see 1 POMEROY, EQ. JUR., 3 ed., § 197. In a few exceptional cases, equity has interfered in criminal proceedings to protect property rights. *Iron Works v. French*, 12 Abb. N. C. 446.

¹² See *Sanders v. State*, 85 Ind. 318.

¹³ Where the grounds for relief were known at the time judgment was entered, a limitation on the time within which to bring the motion may be perfectly just.

¹⁴ 7 Edw. VII., c. 23.

¹ Cf. *The Five Per Cent Case*, 31 I. C. C. 551. For a *résumé* of this first decision, see 28 HARV. L. REV. 97. On September 19, 1914, the Commission ordered, "That

mission cannot properly be said to have reversed itself, for, as they point out, the events which have occurred since the original decision present a new situation. In the face of that situation the majority of the Commission deemed it necessary to extend the relief granted in the original decision. This they have done by extending the authorization of a five per cent increase in freight rates, there accorded only to the roads in Central Freight Association territory,² to the entire territory east of the Mississippi and north of the Ohio except the New England states.³ And, whereas certain classes of freight were excepted from the operation of that decision, the only exceptions now made are rail-and-lake rates, rates on bituminous and anthracite coal, coke, and iron ore, and rates already fixed by unexpired orders of the Commission.⁴ The rates on cement, starch, brick, tile, clay, and plaster, specially excepted from the prior increases, are now subject to a five per cent increase throughout this territory.

It will be recalled that in their original report the Commission were unanimous in the opinion that the revenues of the railroads in official classification territory were insufficient, but that the majority of the Commission were of the opinion that, except as to the roads in Central Freight Association territory, a horizontal increase in freight rates was neither a necessary nor proper remedy for the situation, and they suggested ten other sources of additional revenue for the petitioning carriers.⁵ The considerations which prevailed upon a majority of the Commission to alter this decision were, first, the fact that the needs of the railroads were greater than had been anticipated, as evidenced by subsequent returns; second, the increased difficulties in the way of meeting these needs occasioned by the European war; third, the fact that the remedial measures suggested by the Commission in July were not adapted to meeting such a sudden contingency.

The completed returns for the fiscal year ending June 30, 1914, showed

further hearing in said cases be, and is hereby, granted; said hearing to be limited to presentation of facts disclosed and occurrences originating subsequently to the date upon which the records previously made in these cases were closed."

² That part of the United States lying between the Ohio River and the lakes from the Mississippi to the Atlantic seaboard is known as official classification territory. For rate purposes it is divided into three sections: the New England states; the territory between the Atlantic seaboard and Buffalo and Pittsburg, known as trunk line territory; and the territory from Buffalo and Pittsburg to the Mississippi, known as Central Freight Association territory.

³ Intra-territorial rates in New England were already being cared for by a thorough readjustment of interstate and intrastate rates carried out with the approval of the various state commissions in that territory. The only authorized increases in New England, therefore, were such as might be necessary to preserve the existing differentials between New England points and points in trunk line territory. The authorized increases in official classification territory generally were not confined to intra-territorial rates, but extended also to joint rates between official classification territory and outside points, provided no increase should exceed five per cent of the official classification carrier's portion of the rate. By a supplementary order the Commission has also permitted the railroads to increase some rates more than five per cent where necessary to preserve existing differentials.

⁴ The rates here enumerated had either been recently increased, or proposed increases were under consideration by the Commission in other proceedings. See 32 I. C. C. 331.

⁵ See 31 I. C. C. 551; 28 HARV. L. REV. 97.

the net operating revenues of the railroads in official classification territory to be lower than in any year since 1908, while the property investment had increased by over \$1,300,000,000 since that year. And the additional returns for the succeeding months of July, August, and September showed that the downward trend of revenues had by no means run its course.

The blow which the war in Europe struck our industry and commerce is too well known to need amplification here. The railroads in official classification territory must refund loans aggregating over \$500,000,000 within the next three years. In view of the enormous European investment in American railroads, and the effect which this great war must have upon the amount of capital available in the next few years and the rate of interest which it will command, it can scarcely be doubted that these railroads must suffer severely from the effects of that conflict.

The dissenting commissioners were not inclined to quarrel with these findings, but they doubted the legality and propriety of the Commission's changing its original decision because of them. Their attitude was, briefly, if this increase was unreasonable in July when the railroads admittedly needed increased revenue, how can the fact of a war in Europe and the fact that the needs of the railroads are greater than had been anticipated make this increase reasonable in December? Commissioner Harlan was inclined to the opinion that the Commission had no legal right or power to be governed in its regulation of rates "by conditions presumably temporary in their nature."⁶

However this may be, it would be unfortunate in the extreme if the Commission had no power to afford temporary relief to the railroads in an emergency. The real danger, as pointed out by both Commissioners Harlan and Clements,⁷ is that this temporary relief will be hailed (as, indeed, it seems to have been hailed by many financial journals) as a permanent dispensation and the real remedies urged by the Commission in its original decision cast aside. No sensible merchant, who found his profits steadily declining, would think of making a blanket increase of five per cent in the prices of all his wares. The only permanently efficacious remedy for the general railroad situation would seem to be a thorough revision of rates and redistribution of charges, with an increasing attention to economy and efficiency in railroad management.⁸ By these means alone can the Hydra's wounds be cauterized and the Herculean task accomplished.

MILITARY TRIALS OF CIVILIANS IN TIMES OF PEACE. — Not long ago a storm of justifiable protest arose at the action of military authorities in West Virginia in trying and sentencing rioting strikers before military tribunals, without jury. The fact that this action was

⁶ See 32 I. C. C. 325, 335.

⁷ See 32 I. C. C. 325, 335.

⁸ Public hearings will commence this month upon a petition for a general increase of rates by the roads west of the Mississippi River. But the western roads are not asking for a horizontal increase in all rates, but propose a general overhauling of rates with advances ranging from two to thirty per cent according to traffic conditions.

upheld¹ by the Supreme Court of that state renders a recent Montana case peculiarly welcome. The latter case declares that while the exigencies of the situation as determined by the governor warranted the summary arrest and detention of persons guilty of rioting or likely to foment trouble, the military authorities were without constitutional power to establish courts and try offenders, and that sentences thus imposed were invalid. *Ex parte McDonald, In re Gillis*, 143 Pac. 947.

Military tribunals are of two kinds, courts martial and military commissions.² The former are created by act of Congress with jurisdiction limited to the trial of offenses against the Articles of War and other enactments passed for the government of the army and navy. They are without power over civilians.³ Military commissions derive their sanction from the laws of war, and are organized to administer military justice in cases not provided for in the Articles of War.⁴ Civilians are amenable to their jurisdiction when enemy territory, or domestic territory having temporarily the same status owing to the politically organized rebellion of its inhabitants, is placed under military government⁵ during hostile occupation.⁶ Such persons are protected by no constitutional guaranties.⁷ Civilians may also become amenable to military courts when so-called martial law or, better, martial rule, is inaugurated under the war power in domestic territory which is the actual theater of war. The power to govern such territory with the military seems to be a necessary implication from the power to wage war.⁸

But martial law or martial rule established by the chief executive of a state for the suppression of internal disorder presents a different situation. It has been asserted by eminent authority that the existence of martial rule under such conditions gives the military no greater powers than those ordinarily possessed by peace officers.⁹ However, it seems settled that the existence of such martial rule does change the normal legal situation and warrant the use of methods more summary than are

¹ *State v. Brown*, 71 W. Va. 519, 77 S. E. 243. We are unable at this time to agree with the incidental approval given this case in 26 HARV. L. REV. 636. The discussion then was devoted principally to another question.

² See DAVIS, *MILITARY LAW*, 3 ed., 307.

³ Except to a very limited extent, see *ibid.* pp. 42, 46.

⁴ See *ibid.* pp. 307 ff.

⁵ Military jurisdiction is divided into military law, which governs the army and navy; military government, which is imposed upon territory under hostile occupation; and martial law, which denotes the exercise of the military power over domestic territory when called forth by necessity. See the concurring opinion of Chief Justice Chase in *Ex parte Milligan*, 4 Wall. (U. S.) 2, 141. "Martial law" is perhaps a misleading term. The meaning is better expressed by "martial rule." See DAVIS, *MILITARY LAW*, 3 ed., 300.

⁶ See DAVIS, *MILITARY LAW*, 3 ed., §§ 309 ff.

⁷ 2 WILLOUGHBY, *THE CONSTITUTION*, §§ 720, 721, 732.

⁸ See *Ex parte Milligan*, *supra*, p. 127. It has been forcibly argued that no war-time necessity, however great, can authorize the trial of civilian offenders on domestic territory by military courts. See 12 COL. L. REV. 529, 537. In England martial law may thus be extended to territory threatened but not yet in the war zone. See *Ex parte Marais*, [1902] A. C. 109.

⁹ See Sir Frederick Pollock in 18 L. QUART. REV. 152; Henry Winthrop Ballantine in 12 COL. L. REV. 529, 534; *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484; *Ela v. Smith*, 5 Gray (Mass.) 121.

available to the ordinary guardian of the peace. Thus the order of a superior officer will under certain conditions justify a homicide otherwise criminal.¹⁰ And persons may be arrested and detained indefinitely during the existence of the disorder merely as a preventive measure, without criminal indictment or charge.¹¹ But it is one thing to hold that the existence of a state of extreme lawlessness and disorder brings such procedure within the meaning of due process of law, and quite another to recognize that because of such necessity, however great, the executive may, in the exercise of an uncontrolled discretion, entirely suspend the constitutional guaranty of trial by jury and subject the lives and liberties of citizens to the summary jurisdiction of military courts. Law enforcement as an end cannot justify a suspension of the most fundamental law. Where the local courts are open, such procedure does not seem essentially different from that condemned by the United States Supreme Court in a somewhat similar case,¹² but it is submitted that the Montana court is correct in holding that the availability of the local courts is immaterial. While necessity may authorize a great enlargement of executive power within its field, it is difficult to support such executive usurpation of judicial power expressly lodged in another department. Moreover there seems to be no necessity for the immediate trial of offenders who may be imprisoned until their cases can later be brought before the proper tribunal. Nor can the West Virginia procedure be justified under the laws of war, first because the laws of war are only applicable where a state of organized rebellion exists,¹³ and second because the power to declare war is vested exclusively in the federal government.¹⁴ The existence of martial rule is justified only by its necessity for the preservation of the peace. It is to restore and not to become a substitute for civil authority; and a practically unlimited power of arrest and detention seems to afford means amply sufficient to bring about this result without further violation of the supremacy of the civil over the military power.¹⁵ The recent utterance of the Montana court affords a salutary answer to the subversive doctrine so recently enunciated in West Virginia.

STATUTORY DISCRIMINATIONS AGAINST NEGROES WITH REFERENCE TO PULLMAN CARS. — A new phase of the Jim Crow question has been presented by statutes which allow railroads to provide sleeping cars, chair

¹⁰ *Commonwealth v. Shortall*, 206 Pa. St. 165, 55 Atl. 952.

¹¹ *In re Boyle*, 6 Idaho 609, 57 Pac. 706; *In re Moyer*, 35 Colo. 159, 185 Pac. 190; *Moyer v. Peabody*, 212 U. S. 78.

¹² *Ex parte Milligan*, *supra*, where it was said that military trial in time of war could never be warranted in uninvasion domestic territory where civil courts were sitting.

¹³ The distinction between mere riot or insurrection and organized rebellion which gives rise to a state of public war is clearly drawn in *The Prize Cases*, 2 Black (U. S.) 635, 672, 687.

¹⁴ 2 WILLOUGHBY, *THE CONSTITUTION*, §§ 730, 714.

¹⁵ COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., p. 435; and see also a learned article on the subject of this note in 5 *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY*, 718.

cars, and dining cars for white passengers without supplying like cars for negroes.¹ In a recent case the United States Supreme Court intimated that such a statute is unconstitutional, even though it be shown that there is not a sufficient demand among negro passengers to warrant the providing of such accommodations for them. *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151.²

As a general proposition, any discrimination based on color, the result of state as distinguished from individual action, may, under the Fourteenth Amendment, be eradicated by the federal courts.³ But the notion of just what constitutes discrimination at any given time is a variant chiefly determined by an equally unstable public opinion. At the close of the Civil War the prevalent idea regarded the mere segregation of the negro, in public conveyances, as discrimination. And this attitude was reflected in the courts.⁴ Of later years, however, mere separation is not regarded as discrimination; accordingly, the so-called Jim Crow statutes, making compulsory the segregation of negro passengers in common carriers, are upheld.⁵ The theory is that classification is not discrimination;⁶ that equality before the law does not involve the right to occupy identical conveyances;⁷ and that such statutes are reasonable police regulations designed for the mutual comfort and security of both races.⁸ Regarded abstractly, the Jim Crow statutes do secure equality before the law. If the car reserved for white passengers is closed to negroes, the converse is likewise true. Yet it is questionable whether this kind of equality is that which the Fourteenth Amendment was intended to secure.⁹ In practice, these classifications are always imposed by the white race; and the motive is admittedly the avoidance of the black race. Since this purpose is accomplished, the technical equality before the law held out to the negro partakes somewhat of the nature of a sop. Perhaps this is the best the law can do. On its face it promises equality, but it cannot change the feelings of the people.¹⁰ At least the law can enforce this standard of apparent equality. Hence, if certain classes of one race are allowed to ride with the other, like exemptions must be made in regard to the other race.¹¹ Moreover, statutes allowing separate conveyances must require that these be equal in

¹ REV. LAWS, OKLA., 1910, §§ 860 *et seq.*; KIRBY'S DIGEST OF ARK. STAT., § 6625; 3 MCEACHIN TEX. CIV. STAT., ann. art. 6750.

² Mr. Chief Justice White, Mr. Justice Holmes, Mr. Justice Lamar, and Mr. Justice McReynolds impliedly dissent. For a statement of the case, see RECENT CASES, p. 425.

³ See the Civil Rights Cases, 109 U. S. 3, 13.

⁴ See *Railroad v. Brown*, 17 Wall. (U. S.) 445, 452. In some of the northern states this attitude continued for some years later. See *Ferguson v. Gies*, 82 Mich. 358, 363, 46 N. W. 718, 720 (separation in restaurant).

⁵ *Plessy v. Ferguson*, 163 U. S. 537; *Ohio Val. Ry.'s Receiver v. Lander*, 104 Ky. 431, 47 S. W. 344, *aff'd* 882; *Morrison v. State*, 116 Tenn. 534, 95 S. W. 494; *Logwood v. Memphis & C. R. Co.*, 23 Fed. 318.

⁶ See *Morrison v. State*, *supra*, p. 546.

⁷ See *Logwood v. Memphis & C. R. Co.*, *supra*, p. 319.

⁸ See *Ohio Val. Ry.'s Receiver v. Lander*, *supra*, p. 444. See *Gaines v. Seaboard Air Line Ry.*, 16 I. C. C. 471, 473.

⁹ See Sec. 1 of the Civil Rights Bill of 1875, 18 U. S. STAT. AT L., 335. See *Harlan's* dissent in *Plessy v. Ferguson*, *supra*, p. 557.

¹⁰ See *West Chester & Philadelphia R. Co. v. Miles*, 55 Pa. St. 209, 213.

¹¹ *State v. Patterson*, 50 Fla. 127, 39 So. 398 (statute exempting negro nurses in charge of white children held unconstitutional).

all points of comfort and convenience.¹² The same principles appear applicable to Pullman and other sleeping cars, for if these luxuries are provided, they are open to all passengers without discrimination as much as ordinary coaches.¹³ In the recent case before the United States Supreme Court, the argument in favor of the statute was based upon the comparatively negligible demand for Pullman accommodations by negro passengers. But the demand which such cars are installed to meet is created by the traveling public. If the demand is sufficient to warrant the furnishing of Pullmans at all, to exclude however minute a portion of that public simply because of color seems to be sheer discrimination. The *dictum* of the majority in the principal case therefore appears correct.

If then these statutes are unconstitutional, it would seem that a practical problem of some difficulty faces those states which desire segregation of the races in Pullmans. To require the railroad to duplicate its Pullman accommodations in the face of a considerable financial loss, because of the little or no demand for "black" Pullmans, although a considerable white patronage existed, would savor strongly of a deprivation of property without due process of law.¹⁴ So if the Jim Crow laws apply to Pullmans, the railroad would seem justified in refusing such service until the demand was sufficiently great to make feasible the installation of separate cars at at least a nominal profit. But in many cases the whites would then not be properly accommodated, and the railroad would be losing profits which the traffic was willing to pay. Thus the railroads may be induced to offer a practical solution of the difficulty by partitioning off for negroes a portion of the same Pullman coach sufficient to meet what small negro demand arises. Even if segregation laws are not applied to Pullmans, if we assume a public opinion which finds expression in such statutes, the railroads' problem is still to segregate the negro or lose entirely its white patronage. It seems, therefore, that although the situation may be handled by statute, a desire for the profits of this white patronage would be a sufficient incentive to cause the southern railroads on their own initiative to devise, even more effectively, ways and means for a practical solution.¹⁵

THE INTERSTATE COMMERCE COMMISSION'S ANNUAL REPORT.—
The dramatic conflict of large economic forces centering in the recent

¹² Cf. *Murphy v. Western & A. R. R.* 23 Fed. 637, 639; *Gray v. Cincinnati Southern R. Co.*, 11 Fed. 683, 686.

¹³ *Nevin v. Pullman Palace-Car Co.*, 106 Ill. 222; see *Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782, 802, 22 So. 53, 57.

¹⁴ See *Smyth v. Ames*, 169 U. S. 466, 526.

¹⁵ A complication not directly presented by the principal case is the application of the interstate commerce clause to Jim Crow statutes. This question is usually avoided, as it was here, by construing the statutes as including intrastate passengers only. *Louisville, N. O. & T. Ry. v. State*, 66 Miss. 662, 6 So. 203; *Chesapeake & O. Ry. v. Kentucky*, 179 U. S. 388. But the recent decision in the *Shreveport Rate Cases*, 234 U. S. 342, 28 HARV. L. REV. 34, 294, would seem to have a bearing on the question. If the negro traveling to A., which is across the state line, is exempted from the Jim Crow statutes, may he not prefer A., as a trading center, to B., which is within the state? Thus, though only a regulation of intrastate travel, it might well interfere with interstate regulations.

railway rate controversies before the Interstate Commerce Commission has focused attention on this branch of the Commission's work.¹ The extent and diversity of its routine activities, however, are often overlooked in public discussion. Yet they involve administrative, judicial, and legislative problems of great complexity and legal significance. As summarized in its last annual report,² they show in a striking manner how important a place in the machinery of our federal system of jurisprudence the Interstate Commerce Commission has achieved.

The duty to serve the public without discriminating between place, person, or class is fundamental in the modern conception of a common carrier; and much of the Commission's labor is devoted to enforcing this duty. Congress has forbidden discrimination in general terms;³ the Commission must decide whether a given tariff is in fact discriminatory.⁴ Congress has decreed that no carrier shall depart from published tariffs;⁵ the Commission must decide whether, in a particular instance, money collected in accordance with the published tariffs should be refunded because, for one cause or another, the charge was unreasonable.⁶ Congress has declared that no railroad shall charge less for a long haul than for a shorter haul included therein;⁷ it has given the Commission power, in special cases, to allow exceptions to this rule.⁸ The Commission's task, in part legislative and in part judicial, requires it to solve a tangled conflict of economic interests, to balance broad principles of social and commercial policy, and to apply the resultant to a set of business facts of a complexity that often baffles analysis. Aside from these duties, the Commission is charged with the important administrative task of ferreting out the still persistent rebate evil. Fifty-eight indictments, — twenty against carriers and thirty-eight against shippers, passengers, or other parties, — were found during the eleven months covered by the report, based on evidence submitted to prosecuting attorneys by the Commission. Sending less-than-carload shipments at carload rates, billing goods to fictitious destinations, false classification of shipments, leasing of terminal facilities to shippers at less than cost, "official graft" of various hues and kinds, and what the Commission aptly terms "smokeless rebates" in the form of excessive

¹ The findings of the Commission in the so-called Five Per Cent Case, 31 I. C. C. 551, 32 I. C. C. 325, are discussed in 28 HARV. L. REV. 97, and in this issue of the REVIEW, p. 413.

² TWENTY-EIGHTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, issued Dec. 10, 1914. Owing to a change in the date of issue, the report covers only the eleven months from Dec. 1, 1913, to Oct. 31, 1914.

³ Sections 2 and 3 of the ACT TO REGULATE COMMERCE (1887), 24 U. S. STAT. AT L., 379.

⁴ This question was involved in most of the 882 complaints on the Commission's "formal docket" adjudicated during the eleven months covered by the report, and in many of the 7,600 informal complaints adjusted by correspondence.

⁵ ELKINS LAW (1906), 34 U. S. STAT. AT L., 586.

⁶ The Commission disposed of 5,604 applications involving this question during the eleven months of the report.

⁷ Fourth section of the ACT TO REGULATE COMMERCE, *supra*, as amended by Sec. 8 of the MANN-ELKINS ACT (1910), 36 U. S. STAT. AT L., 547.

⁸ The Report mentions 1,086 orders issued by the Commission under this section. See especially Fourth Section Violations in the Southeast, 30 I. C. C. 153.

allowances on damage claims,⁹ are some of the ingenious subterfuges enumerated in the report by which shippers have sought to defraud carriers, or carriers to favor individual shippers. The enumeration shows that what has been described as "the most prolific source of evil known in transportation,"¹⁰ is unfortunately not yet a thing of the past.

Rivaling in importance the duty not to discriminate, is the obligation imposed on carriers to make reasonable provision for the safety and welfare of patrons and employees. In recent years, this general common-law duty has become more and more crystallized by legislation into a specific duty, under pain of prosecution, to maintain certain fixed standards of equipment and management. The Commission endeavors to enforce these standards, by searching for violations of the various regulating statutes and referring the collected data to prosecuting officials;¹¹ by investigating train accidents and reporting causes and suggesting cures;¹² and by informally pointing out to railroad officials defects in equipment where prosecution is deemed inadvisable. Since 1911, also, a nation-wide system of boiler inspection has been conducted by the Commission, with gratifying results.¹³

Financial and accounting reforms, and reforms in the technique of railway administration, make up a third group of the Commission's activities. They range from the giving of informal assistance, through an expert employed by the Commission, in the intricate task of unifying freight classification, and the revision of prescribed accounting systems under the Hepburn Act,¹⁴ to the more spectacular investigations of the financial affairs and practices of railroad systems from New England to the Pacific.¹⁵ There should be mentioned also the formidable task of supervising the installation of the system of classifications, rates, and regulations for express companies prescribed in 1913. Even more arduous is the duty placed upon the Commission by Sec. 20 of the Panama Canal Act, prohibiting railroad ownership or control of competing water lines, except where, in the Commission's judgment, the public interest warrants exemptions.¹⁶ The Commission is investigating, under this Act, fifty-eight applications, embracing seventy-nine water-

⁹ The Commission points out the significant fact that from 1900 to 1913, roughly the period in which rebating has been most vigorously prosecuted, payments for loss and damage have jumped from \$7,055,622 to \$30,885,454, and expresses the belief that many claims are paid "not because the carriers feel that the claims are valid, but because claimants threaten to divert traffic unless claims are paid."

¹⁰ RIPLEY, RAILWAYS: RATES AND REGULATION, p. 188.

¹¹ SAFETY APPLIANCE ACT (1893), 27 U. S. STAT. AT L., 531; amended 1896, 29 U. S. STAT. AT L., 85; ASH PANS ACT (1908), 35 U. S. STAT. AT L., 476; HOURS OF SERVICE ACT (1907), 34 U. S. STAT. AT L., 1415-1417.

¹² Sixty-three such accidents were investigated during the period covered by the report.

¹³ Required by the BOILER INSPECTION LAW (1911), 36 U. S. STAT. AT L., 913. During the three years' operation of the statute, accidents due to boiler defect have been reduced 35 per cent, with a reduction of 75 per cent in the number of deaths resulting, and of 39 per cent in the number of injured.

¹⁴ 34 U. S. STAT. AT L., 593 (1906).

¹⁵ Thirty-five such investigations have been concluded during the past year, or are still pending. Of these, nine were in response to resolutions of the House or Senate, and the remainder were initiated by the Commission.

¹⁶ 37 U. S. STAT. AT L., 566 (1912).

line interests, each involving knotty problems of corporate and financial interrelation.

What is perhaps the largest single task imposed on the Interstate Commerce Commission in the twenty-eight years of its existence deserves final mention: the physical valuation of the whole system of interstate carriers.¹⁷ The report shows this monumental undertaking already well under way. To establish the present cost of reproduction of the railways, the country has been divided into five districts, and eight engineering field parties in each district are making inventories of the railroad property.¹⁸ To establish the original cost, to date, of each piece of railroad property, as called for in the Act, a staff of accountants is at work on the books of the railroads in each district.¹⁹ Finally land experts and attorneys are appraising railroad lands and rights of way, determining both present value and actual cost, if any, to the railroad. The result should be a Domesday Book of the American transportation system hard to overestimate in its economic, legal, and legislative consequences.

FAILURE TO REGISTER STOCK TRANSFERS. — In transferring stock of a corporation the proper change on the register is often omitted; and from this, legal complications may ensue in determining the owner upon whom various forms of stockholders' liability shall fall. The question may arise when the corporation or its receiver is assessing the stockholders. Although the owner of the shares has made a *bonâ fide* transfer of them, if no change is made on the corporation's books provided for the purpose, he still retains the legal title, though the equitable title goes to the purchaser.¹ If no notice of the sale has been given to the proper corporate officer, it has been held both that the legal owner of record is liable, much as any other trustee of the stock would be,² and that the beneficial owner can be held as well,³ although there can of course be no double recovery. If the former has to pay, he has the right to reimbursement or exoneration from the latter;⁴ allowing a direct right against the beneficial owner is therefore a legal short-cut in place of equitable execution by the corporation upon this right of the registered owner.⁵ If, however, the corporation has been properly notified of the transfer, the failure to transfer on the books is the corporation's own fault; and it would seem clear that when no creditor's rights are affected the book owner should not be liable for assessments, as the corporation is

¹⁷ Required by Sec. 19 (a) of the ACT TO REGULATE COMMERCE, as amended 1913, 37 U. S. STAT. AT L., 701.

¹⁸ The Commission expects soon to more than double the number of field parties in each district.

¹⁹ The Commission suggests tentatively that this detail of the valuation program may involve "an expenditure out of all proportion to the value of the results."

¹ See *Black v. Zacharie*, 3 How. (U. S.) 483, 513.

² *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10; *Brown v. Allebach*, 166 Fed. 488.

³ *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162; *Brown v. Artman*, 166 Fed. 485.

⁴ *Kellog v. Stockwell*, 75 Ill. 68.

⁵ See 22 HARV. L. REV. 608.

precluded from setting up the registered title which, but for its carelessness, would have been transferred.⁶

By statute very generally creditors can hold stockholders individually liable in certain cases. When the suit is by creditors and not by the corporation, it can be seen that different considerations enter. Here *a fortiori* the book owner who has not notified the corporation of the transfer should be liable, for the creditor may have relied upon his name on the book.⁷ But when the failure to change is the fault of the corporation, the question is more difficult. A recent case holds that here the registered owner should not be liable to the creditor, as he has done all that a reasonable man would do to affect the transfer. *Bank of Midland v. Harris*, 170 S. W. 67 (Ark.).⁸ There is a conflict on the analogous question of whether a deed should be considered as duly recorded when through negligence at the recorder's office some requisite act has not been done. The cases that hold the recording invalid argue that the hardship involved in making a man see to it at peril that the recording is properly done is outweighed by the great public policy of letting purchasers of land rely absolutely on the record.⁹ Although there is a strong body of authority on the other side,¹⁰ this would seem the better view. There is a similar policy in the case of corporations. Its franchise is a gift from the state, and to prevent abuse of that gift the state makes various requirements of which the keeping of a register book is one. It is a right of the state that it or its citizens may be able to find out at any time from the register who have succeeded to this franchise. It might well be argued that definite ascertainment of this apostolic succession was of so great public importance that no consideration of fairness in individual cases should outweigh it, and that the register should be conclusive, except where the corporation having actual notice of the transfer is itself precluded from taking advantage of its own neglect to make the change.¹¹ After all it is not a very grave hardship to force the book-owner to oversee the registration at his peril, while if he is forced to pay he always has the chance of his remedy over against the beneficial owner. It can be seen, however, that the public policy in this case is not as strong as in the case of recording a deed, for creditors of a corporation, as a matter of fact, do not rely on the register as do purchasers of land. Hence it is not very surprising that instead of a strict simple rule considerations of fairness to individuals have been considered and have led to authority in accord with the principal case.¹²

⁶ *Whitney v. Butler*, 118 U. S. 655. In such a case the legal short-cut for equitable execution would not explain the corporation's holding the beneficial owner for assessments. But no doubt, as notice had been given to make the transfer, he would not be allowed to say that he did not have the legal title.

⁷ *Richmond v. Irons*, 121 U. S. 27; *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray (Mass.) 216.

⁸ For a more complete statement of the case, see RECENT CASES, p. 427.

⁹ *Jennings v. Wood*, 20 Ohio 261; *Barnard v. Campau*, 29 Mich. 162; *Miller v. Bradford*, 12 Ia. 14.

¹⁰ *Merrick v. Wallace*, 19 Ill. 486. See *Gillespie v. Rogers*, 146 Mass. 610, 612.

¹¹ *Richmond v. Irons*, *supra*, is not *contra* to the principal case. It held the registered owner liable when notice had been given to an officer of the corporation who chanced also to be the vendee of the stock, — but on the ground that this was not proper notification. In the principal case the vendee of the stock was also an officer, but appears to have been the only proper person to notify.

¹² *Earle v. Carson*, 188 U. S. 42.

RECENT CASES

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — DIVISION OF COURT. — On appeal from a conviction of murder in the second degree, two judges favored affirmance, and the other three held that the conviction should be set aside. Of these three, two held the refusal of one instruction erroneous, while the third joined with one of these two in holding a certain instruction bad, and was alone in thinking the refusal of another instruction error. Only two of the three, however, voted to remand the case for a new trial, for the other voted for a reduction of the degree of the offense to manslaughter. Hence on no one assignment of error was a majority of the court for reversal. *Held*, that the judgment be set aside and that the cause be remanded for new trial unless the state elect to stand on a conviction for manslaughter. *Price v. State*, 170 S. W. 235 (Ark.).

Where an appeal arises on a single assignment of error and a majority of the court is for reversal but for different reasons, it is properly held that there should be a reversal. *Browning v. State*, 33 Miss. 47, 87; *Oakley v. Aspinwall*, 1 Duer (N. Y.) 1. Even where the appeal is on several assignments of error and a majority upholds each assignment, but the minority on the separate assignments unite on the vote for reversal and become a majority, it has been held that there should be a reversal. *Smith v. United States*, 5 Pet. (U. S.) 292. See 22 HARV. L. REV. 533. This result seems to be required by logic, so long as the judges vote on the general question of reversal rather than separately on each specific assignment of error. It is obvious, however, as a matter of practice, that a new trial is futile when a majority of the appellate court has sustained the trial court on every point. On this ground, some courts have held, even apart from statute, that there should be no reversal. *In re McNaughton's Will*, 138 Wis. 179, 118 N. W. 997, 1001. See *Legal Tender Cases*, 52 Pa. 9, 101. Statutes requiring a separate vote on each assignment of error lead to this same result in other states. See MD., PUB. GEN. LAWS, Art. 5, §§ 4, 9; cf. *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 48 N. E. 751. In the principal case, therefore, unless the compromise reached was demanded by local practice, it would seem that an affirmance might have been justifiable.

BILLS AND NOTES — STATUTES — NEGOTIABLE INSTRUMENTS LAW: EFFECT ON STATUTE MAKING USURIOUS NOTES VOID. — A statute declared void all notes given for usurious consideration. Sections 55 and 57 of the uniform Negotiable Instruments Law, subsequently adopted, provide that the title of a person who negotiates an instrument is defective when obtained for an illegal consideration, but that a holder in due course holds the instrument free from such defects. The plaintiff was an innocent holder for value of a note given for usurious consideration. *Held*, that the plaintiff can recover. *Emanuel v. Misicki*, 149 N. Y. Supp. 905 (Sup. Ct.).

The principal case is additional authority to the effect that the Negotiable Instruments Law repeals by implication previous statutes making void instruments obtained in illegal transactions. *Wirt v. Stubblefield*, 17 App. D. C. 283; *Klar v. Kostiuk*, 65 N. Y. Misc. 199, 119 N. Y. Supp. 683. But there is much authority, including a late Iowa case, to the contrary, and this attitude seems much preferable, for the reason that a clear provision for repeal should be necessary to abrogate the previous statute. *Penny Savings Bank v. Fitzgerald*, 149 N. W. 497 (Ia.); *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Crusins v. Siegman*, 81 N. Y. Misc. 367, 142 N. Y. Supp. 348; *Martin v. Hess*, 71 Leg. Intell. 148 (Phila. Munic. Ct.). Furthermore, it is difficult to see how

the provisions of the Negotiable Instruments Law have any application, for when a statute makes the instrument void from its inception, the case is properly not one of defective title, but one where no negotiable instrument ever came into legal existence. See 27 HARV. L. REV. 679.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — JUDICIAL SEPARATION IN ENGLAND. — An Englishwoman was married to a Spaniard in England. After several years of foreign residence she returned, and at a time when her husband was also in England she filed a petition for judicial separation based on adultery. The husband defended on the ground that his domicile was in Spain. *Held*, that the English court has power to grant the relief. *Riera v. Riera*, 138 L. T. J. 37 (Prob. Div.).

A rather sharp divergence between America and England has come about on the problem whether divorce can be granted the wife by any jurisdiction except that of the husband's domicile. By the prevailing American rule the wife may acquire a separate domicile for the purpose of securing divorce if the conduct of the husband has been such as to justify her action. *Ditson v. Ditson*, 4 R. I. 87. See 15 HARV. L. REV. 66, 28 *id.* 196. But the English courts have adhered to the principle that an actual change in the marriage status can be effected only at the domicile of the husband. See 26 HARV. L. REV. 447. Even in England, however, a deserted wife is allowed to sue at the last previous matrimonial domicile, so as to prevent the husband from asserting his changed domicile for the purpose of profiting by his own wrong. *Deck v. Deck*, 2 Sw. & Tr. 90. And it was further established in a celebrated case that an English court may grant to the wife a judicial separation to protect her from the cruelty of her husband, even though his domicile is foreign. *Armylage v. Armylage*, [1898] Prob. 178. This was regarded not as a decree that would in any way affect the marriage status, but rather as a manifestation of the inherent right of the sovereign to bestow personal protection on those within its territory. The principal case seems clearly right in extending this relief to adultery, for it should be open to give needed protection against all abuses of the personal relation between the parties.

CONSTITUTIONAL LAW — PRIVILEGES, IMMUNITIES, AND CLASS LEGISLATION — PERSONAL DISCRIMINATION: JIM CROW STATUTES. — The Oklahoma Separate Coach Law permitted railroads to haul sleeping cars, dining cars, and chair cars for white passengers without providing like accommodations for negroes. In a suit for an injunction to restrain the defendant railroads from furnishing such cars for white passengers only, it was shown that there was no sufficient demand to warrant the railroads in supplying separate Pullmans for negroes. *Held*, that the bill be dismissed as too vague for equitable relief. But the majority of the court intimated that in a proper action the statute would be held unconstitutional. *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151.

For a discussion of this new phase of the Jim Crow question which the Supreme Court here considered, see NOTES, p. 417.

CONSTITUTIONAL LAW — TRIAL BY JURY — TRIAL OF CIVIL OFFENDER BY MILITARY COMMISSION. — The governor of Montana declared martial law in a district where rioting was prevalent. The relator was arrested on the charge of resisting an officer and tried and sentenced by a military commission. He sued out a writ of *habeas corpus*. *Held*, that the relator be remanded to await trial before a legally constituted civil tribunal. *Ex parte McDonald, In re Gillis*, 143 Pac. 947 (Mont.).

For a discussion of the principles involved, see NOTES, p. 415.

CONSTRUCTIVE TRUSTS — MISCONDUCT BY NON-FIDUCIARIES — CAN ONE GUILTY OF HOMICIDE, WITHOUT INTENT TO ACQUIRE PROPERTY THEREBY, OBTAIN TITLE BY HIS CRIME? — A husband, intending to kill a third person, killed his wife. He was convicted of manslaughter, and now claims his share in the wife's property under the statute of distributions. *Held*, that he is entitled to beneficial succession. *Estate of Fox*, 52 N. Y. L. J. 1115 (Surr. Ct., N. Y. County).

What appears to be the weight of authority agrees with a recent Illinois case, which allows one who murdered his victim in order to inherit his property to retain both legal and beneficial title to the property. *Wall v. Pfanschmidt*, 106 N. E. 785 (Ill.). *McAllister v. Fair*, 72 Kan. 533, 84 Pac. 112; *Hill v. Noland*, 149 S. W. 288 (Tex. Civ. App.). See 27 HARV. L. REV. 280. If this view be adopted, there can be no doubt as to the correctness of the principal case. It has been suggested, however, that in all cases of acquisition of property by murder or other wrongdoing a constructive trust should be raised on the property in favor of the innocent heirs or next of kin of the victim. See AMES, LECTURES ON LEGAL HISTORY, p. 310. The principal case intimates, by way of *dictum*, that this relief should be given in case of homicide with intent to acquire property as heir or devisee. See also *Ellerson v. Westcott*, 148 N. Y. 149, 154, 42 N. E. 540, 542. But in the absence of such an intention, it refuses to deprive the slayer of either beneficial or legal ownership. The constructive-trust theory at best involves serious difficulties, for it is rather anomalous that those who have been deprived of a mere chance of succession should be given property to which they were otherwise not entitled. See 27 HARV. L. REV. 280. In situations where there was no intent to acquire property by the crime, it seems that the theory breaks down completely, for the tort analogy upon which this relief must be based requires intentional wrongdoing with respect to the prospective beneficiaries in order to give them a right of action.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — PROCURING INSTITUTION OF A FRAUDULENT SUIT ON MANUFACTURED EVIDENCE. — A physician, in collusion with two attorneys, persuaded a man to bring an action for alleged injuries sustained in an accident, and before the action was begun, bandaged the plaintiff to make him appear injured. The complaint was withdrawn before trial. On an information, the physician was tried and convicted of contempt of court. *Held*, on appeal, that the conviction should be reversed. *Melton v. Commonwealth*, 170 S. W. 37 (Ky.).

Acts not done in the presence of the court, which tend to obstruct or embarrass the administration of justice, are constructive contempts. See *O'Neil v. People*, 113 Ill. App. 198; 27 HARV. L. REV. 165. Direct contempts, on the other hand, occur in the presence of the court and are punishable immediately by summary proceedings. In cases of constructive contempts, however, the procedure must be that adopted in this case; that is, the accused must be given a chance to defend himself in a regular trial. See RAPALJE, CONTEMPTS, § 22. To bring a fictitious or fraudulent suit to trial is a direct contempt, and is punishable summarily. *Coxe v. Phillips*, Hardw. 237. See *Smith v. Brown*, 3 Tex. 360; *Lord v. Veasie*, 8 How. (U. S.) 251, 255. To persuade and procure a man to bring such a suit, as in the principal case, equally tends to obstruct justice, and should therefore be punishable as a constructive contempt. It should make no difference that the offender is not an officer of the court, or that he is also punishable for the common-law misdemeanor of obstructing justice. *Coxe v. Phillips*, *supra*; *Bradley v. State*, 111 Ga. 174, 36 S. E. 632. The punishment of such a contempt, furthermore, is in the discretion of the offended court, and their decision is ordinarily not subject to review, except for lack of jurisdiction. *Watson v. Thomas*, 6 Litt. (Ky.) 248; *Shattuck v. State*, 51 Miss. 567; see RAPALJE, CONTEMPTS, § 141.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO THE CONTRACT — SOLE BENEFICIARY; CONTRACT MADE BY LABOR UNION FOR THE BENEFIT OF ITS MEMBERS — NEW YORK LAW. — In consideration of the right to use the union label, an employer agreed with a labor union to employ only union workmen and to pay them a minimum wage of eighteen dollars a week. The plaintiff, a member of the union, who in ignorance of this contract had worked for the employer at nine dollars a week, now sues to recover the difference between the wages that he received and the wages stipulated for in the contract between the union and the employer. *Held*, that he can recover. *Gulla v. Barton*, 149 N. Y. Supp. 952 (App. Div.).

In New York a creditor can recover on a contract made for his benefit by his debtor. *Lawrence v. Fox*, 20 N. Y. 268. But a sole beneficiary is not allowed to recover. *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49. When the sole beneficiary is a dependent relative, however, recovery is allowed on the singular theory that the moral obligation to support brings the contract within the rule of *Lawrence v. Fox*. *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724; *Knowles v. Erwin*, 43 Hun (N. Y.) 150. By analogy to this exception, citizens have lately been allowed to recover on contracts made for their benefit by a municipality. *Smyth v. City of New York*, 203 N. Y. 106, 96 N. E. 409; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211. See 25 HARV. L. REV. 289. The principal case goes a step further and establishes the rule that the members of an association for mutual aid can recover on a contract made for their benefit by the association. Since the moral obligation which is owed to a dependent relative or to a member of a union clearly does not make the contract one for the benefit of a creditor, these cases display a growing tendency on the part of the New York courts to relax the rule denying recovery on contracts for a sole beneficiary.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — STOCK LEFT REGISTERED IN VENDOR'S NAME THROUGH CORPORATION'S FAULT. — A bank cashier sold his stock to the man who was about to become president of the bank. By the vendor's resignation there was no proper official to register the transfer, but he trusted his vendee, the new president, to see it properly done. The vendee failed to do this and now a creditor seeks to hold the vendor as a stockholder under an individual liability statute. *Held*, that the defendant is not liable. *Bank of Midland v. Harris*, 170 S. W. 67 (Ark.).

For a discussion of the effect of failure to transfer stock on the books of the corporation, see NOTES, p. 422.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — LIABILITY OF DIRECTOR FOR DAMAGE TO THE CORPORATION AS STOCKHOLDER IN ANOTHER CORPORATION. — Plaintiff corporation owned all but eighteen out of three thousand shares in a New Jersey corporation doing business in Brazil, of which H. was general manager. Defendant, a director of the plaintiff, but not of the subsidiary, corporation, acquired part ownership in another company also doing business in Brazil, of which H., to the knowledge of defendant but unknown to plaintiff, became part owner, and to which, with defendant's assistance in concealing facts, he misapplied \$185,000 of the assets of the subsidiary corporation. The complaint is based on violation of duty as director through neglect to inform and intentional concealment. Defendant demurs. *Held*, that the demurrer should be overruled. *General Rubber Co. v. Benedict*, 164 N. Y. App. Div. 332, 149 N. Y. Supp. 880.

For a discussion of the novel question here presented of whether a corporation is entitled to bring action directly for wrongfully depreciating the value of stock that it holds in a second corporation which may itself proceed against the wrongdoer, see NOTES, p. 409.

EMINENT DOMAIN — COMPENSATION — DENIAL OF COMPENSATION FOR BUILDINGS ERECTED IN LINE OF PLOTTED STREETS. — A state statute authorized the defendant city to adopt a plan of city streets, and provided that property owners should recover no damages for buildings which should be erected within the lines of such plotted streets. The plaintiff owned land in the business center of the city which was adapted for building purposes. Streets had been plotted over this land but had not yet been opened. The plaintiff seeks relief in the federal court against the provisions of the statute. *Held*, that the plaintiff is entitled to no relief. *Harrison v. City of Philadelphia*, 217 Fed. 107 (Dist. Ct., E. D. Pa.).

To deny compensation to a landowner for buildings erected by him in the line of streets plotted but not yet opened, deprives him of a most substantial right of user. Accordingly the authorities are generally agreed that such a statutory provision is unconstitutional. *State v. Carragan*, 36 N. J. L. 52; *Forster v. Scott*, 136 N. Y. 577. Thus if the landowner does erect buildings, he will receive proper compensation in spite of the statute, when the streets are opened. *State v. Carragan*, *supra*. The mere plotting of the streets, therefore, deprives him of no appreciable right of user, and is not such a taking as to demand compensation. *State v. Seymour*, 35 N. J. L. 47; see *District of Columbia v. Armes*, 8 App. D. C. 393, 415. The principal case is equally correct even if the provision denying compensation for subsequently erected buildings is upheld by construing the statute to give a present right to damages for the consequential injury. See *Chester County v. Brower*, 117 Pa. St. 647. To uphold the provision without this construction, however, would deprive the owner of property without due process of law, and in that event, he would be able to invoke the protection of the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 235 *et seq.*

EVIDENCE — CONFESSIONS — ADMISSIBILITY OF INVOLUNTARY CONFESSION TO IMPEACH DEFENDANT AS A WITNESS. — In a trial for murder the written confession of the defendant was not shown to be voluntary, and was not offered as direct evidence. The defendant, however, took the stand, and it was then introduced as a prior contradictory statement, to impeach the defendant's credibility as a witness. *Held*, that it is also inadmissible for this purpose. *Jones v. State*, 149 N. W. 327 (Neb.).

The exclusion of involuntary confessions rests partly upon the desire to give the accused a fair trial, but chiefly upon the probability of their untrustworthiness in view of the circumstances under which they were made. See 1 WIGMORE, EVIDENCE, § 822. In administering this rule of exclusion, some authorities have treated confessions as *prima facie* admissible, relying on their primary character as admissions. *State v. Grover*, 96 Me. 363, 52 Atl. 757; *Hopt v. Utah*, 110 U. S. 574. Other cases hold a confession admissible unless evidence of its involuntary character is introduced, but then throw the burden of proof on the prosecution to show its admissibility. *Queen v. Thompson*, [1893] 2 Q. B. 12; see 1 WIGMORE, EVIDENCE, § 860. The principal case, however, takes the view that the prosecution must show the confession to have been voluntary before it is admissible as direct evidence. *McAlpine v. State*, 117 Ala. 93, 23 So. 130. It therefore seems correct in rejecting it when offered to impeach the defendant. When the accused takes the stand, his credibility may in general be attacked like that of any other witness. *Commonwealth v. Bonner*, 97 Mass. 587; *State v. Murphy*, 45 La. Ann. 958, 13 So. 229. But the prosecution should not be permitted by indirect methods to lay before the jury evidence which is inadmissible directly. Moreover, it is submitted that a confession rejected as untrustworthy evidence of guilt is also somewhat untrustworthy for purposes of impeachment. *State v. Shepard*, 88 Wis. 185, 59 N. W. 449. *Contra*, *Commonwealth v. Tolliver*, 110 Mass. 312; and see *State v. Broadbent*, 27 Mont. 342, 71 Pac. 1.

EVIDENCE—HEARSAY IN GENERAL—APPLICABILITY OF THE HEARSAY RULE TO CONDUCT OF THIRD PERSON.—At the trial of an indictment for murder, the defendant set up, among other defenses, that his blow did not cause the death of the deceased, who had previously been struck by the independent act of a third person. The trial court refused an instruction that the flight of this third person from the scene of the crime should be considered as substantive testimony tending to exculpate the defendant. *Held*, that the instruction was properly refused. *State v. Piernot*, 149 N. W. 446 (Ia.).

The court argues that the flight is barred by the hearsay rule, under the prevailing view that confessions of crime by third persons are inadmissible. *Donnelly v. United States*, 228 U. S. 243. See 26 HARV. L. REV. 755. This is highly questionable. The hearsay rule is designed to exclude assertions upon the credit of persons not sworn and not subject to cross-examination. See 2 WIGMORE, EVIDENCE, § 1362. But conduct, as distinguished from statements or "acts whose import is that of a statement," is not covered by the rule. See PHIPSON, EVIDENCE, 5 ed., 207; 15 AM. L. REV. 71, 77. See also 26 HARV. L. REV. 148. This is evident from a variety of cases. See 1 WIGMORE, EVIDENCE, §§ 272, 461, 462. For instance, a falling off of patronage was admitted to prove that the defendant had injured the plaintiff's product, although the principal case might twist this conduct into an unsworn assertion by third parties that the quality of the article had suffered. *Cunningham v. Stein*, 109 Ill. 375. Similarly, the flight of the third person, if relevant, should be clearly admissible, for it involves no reliance on the credit of any declarant out of court. Nevertheless many courts agree with the principal case in excluding the evidence. *Owensby v. State*, 82 Ala. 63, 2 So. 764. *Ott v. State*, 160 Ala. 29, 49 So. 810. *State v. White*, 68 N. C. 158. *Contra, Jackson v. State*, 67 S. W. 497 (Tex.). It is a narrow enough rule that refuses to admit confessions of guilt by third parties, and it seems highly undesirable, as well as totally indefensible, to reject by analogy evidence not at all within the proper scope of the hearsay rule. The result of the principal case, however, may perhaps be sustained on the ground that the flight of the other actor, however much it may have indicated the consciousness of a criminal act on his part, was not inconsistent with the defendant's act being the fatal force, and was, therefore, irrelevant.

EVIDENCE—TESTIMONY GIVEN AT FORMER TRIAL—ADMISSIBILITY OF TESTIMONY AT CRIMINAL TRIAL IN A SUBSEQUENT CIVIL ACTION.—In an action for damages for personal injuries, the plaintiff introduced evidence of the testimony of a witness, since deceased, in a criminal action against the defendant for the same injury. *Held*, that the evidence is admissible. *Ray v. Henderson*, 144 Pac. 175 (Okla.).

The testimony of a deceased witness in a prior action is said to be admissible in a subsequent action involving the same issue, when it is between the same parties or their privies. The requirement that both parties be the same seems to have been based upon some theory of mutuality of admissibility of the evidence against either party. *Morgan v. Nicholl*, L. R. 2 C. P. 117; *Metro-politan Street Ry. v. Gumby*, 39 C. C. A. 455, 99 Fed. 192. But the theory of this exception to the hearsay rule depends not upon the idea of fairness to both sides, but on whether the party against whom the evidence is offered has had sufficient opportunity to cross-examine the witness concerning the matter in issue. *Charlesworth v. Tinker*, 18 Wis. 633. Upon this theory, the testimony of a witness at a criminal trial has been held admissible against the same defendant in a later civil action involving the same issue, the witness having died in the meantime. *Kreuger v. Sylvester*, 100 Ia. 647, 69 N. W. 1059; *Gavan v. Ellsworth*, 45 Ga. 283. *Contra, McInturf v. Insurance Co. of N. A.*, 248 Ill. 92, 93 N. E. 369. *Harger v. Thomas*, 44 Pa. St. 128. The principal

case, therefore, seems correct in admitting the testimony, and a recent Kentucky case to the same effect now makes it in accord with the weight of authority. *North River Ins. Co. v. Walker*, 170 S. W. 983 (Ky.).

EXTRADITION — INTERSTATE EXTRADITION UNDER THE UNITED STATES CONSTITUTION — *HABEAS CORPUS* PROCEEDINGS RAISING THE DEFENSE OF INSANITY. — A prisoner who had been acquitted of homicide in New York upon the ground of insanity escaped from an asylum to which he had been committed under statutory authority and fled to New Hampshire. He was there arrested for extradition to New York in compliance with a demand based upon an indictment for conspiracy to pervert and obstruct the due administration of the laws of New York. The fugitive sued out a writ of *habeas corpus* in the federal court to test the legality of his arrest. *Held*, that he should not be released. *Drew v. Thaw*, 235 U. S. 432.

A person accused of crime in another state may lawfully be arrested for extradition if, as was plainly the case here, he is a fugitive from the demanding state, and if the demand for his return is accompanied by a duly certified indictment or affidavit, which substantially charges him with the commission of a crime. U. S. CONST., Art. 4, § 2; U. S. REV. STAT., § 5278. And see *Roberts v. Reilly*, 116 U. S. 80, 95, 97. Whether a crime is charged is a question of the law of the demanding state, which is open to inquiry upon *habeas corpus* proceedings. *In re Renshaw*, 18 S. D. 32, 99 N. W. 83. See *Pierce v. Creedy*, 210 U. S. 387. And cf. *Kentucky v. Dennison*, 24 How. (U. S.) 66, 103. But the technical sufficiency of the indictment as a criminal pleading is immaterial. *Ex parte Reggel*, 114 U. S. 642; *Davis's Case*, 122 Mass. 324. Furthermore, the guilt or innocence of the prisoner is not in issue, and any defenses he might offer at his trial are to be disregarded, unless they negative a *prima facie* charge of crime. *Pierce v. Creedy*, *supra*; *Ex parte Hart*, 59 Fed. 894; *Commonwealth v. Supt. of Prison*, 220 Pa. St. 401, 69 Atl. 916; and see cases collected in 21 L. R. A. N. S. 939. Under the laws of New York, a conspiracy to escape from confinement in an asylum under the circumstances of the principal case is plainly criminal. CODE OF CRIM. PROC., § 454; CONSOL. LAWS, N. Y. PENAL LAW, § 580, subd. 6. Hence, the indictment substantially charged a crime, and the court properly refused to consider the possible defense of insanity. It is gratifying that the curiously misconceived opinion of the law advanced by the District Court is thus authoritatively corrected. See *Ex parte Thaw*, 214 Fed. 423.

GIFTS — GIFTS *MORTIS CAUSA* — DELIVERY BY DONOR WHO HAS HOPE OF RECOVERY. — The donor had tuberculosis, and upon leaving for a sanitarium where he hoped to be cured, gave his savings bank book to his physician to give to the donor's sister in case the donor should die. As a matter of fact the donor had practically no chance of recovery, and eleven months later died. The sister now seeks to recover the deposit from the bank. *Held*, that the plaintiff cannot recover, on the ground that the gift was not made in apprehension of death. *Danzinger v. Seamen's Bank for Savings*, 86 N. Y. Misc. 316, 149 N. Y. Supp. 207.

The handing over of a savings bank book is a sufficient delivery for a gift *mortis causa*. *Tillinghast v. Wheaton*, 8 R. I. 536. However, it is essential to such a gift that it should be made under a definite apprehension of death, caused by some existing disease or peril. *Taylor v. Harmison*, 79 Ill. App. 380; *Gourley v. Linsenbigler*, 51 Pa. 345. But it is not necessary that the donor should have given up all hope of life, or that he should die within any fixed time after the making of the gift. *Grymes v. Hone*, 49 N. Y. 17; *Williams v. Guile*, 117 N. Y. 343; *Nicholas v. Adams*, 2 Whart. (Pa.) 17. In

fact, a gift *mortis causa* has been held valid although the donor died of another disease than the one he feared. *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627. It would seem therefore that the gift should have been sustained in the principal case. Consumptives are proverbially optimistic, and the fact that a man takes steps to cure a serious disease does not mean he has no realization of his danger.

HABEAS CORPUS — JURISDICTION TO ISSUE WRIT AFTER COMMITMENT BY ANOTHER FEDERAL COURT UNDER FEDERAL STATUTE ALLEGED TO BE UNCONSTITUTIONAL. — A witness called by a committee of the House of Representatives, authorized to investigate financial conditions as a preliminary to legislation and to examine witnesses for that purpose, refused to answer certain questions put to him by the committee. He was thereupon indicted in the District of Columbia for contempt under U. S. REV. STAT., §§ 101-104, arrested in New York, and held for removal. He then applied for a writ of *habeas corpus* on the ground that Congress had no power under the Constitution to compel a citizen to give such testimony. *Held*, that the writ be discharged. *Henry v. Henkel*, 235 U. S. 219.

Habeas corpus proceedings present the issue whether the prisoner is unlawfully restrained of his liberty. U. S. REV. STAT., § 752. But the general rule is that on such applications, the federal courts will not determine controverted questions of law or fact, but will leave the prisoner to prove his right to liberty in the trial court, and if unsuccessful there, to prosecute his claim by writ of error. See *Ex parte Royall*, 117 U. S. 241, 251. In certain exceptional cases, as where the issuance of the writ is necessary to protect the federal government in the execution of its functions, the court will inquire fully into the questions of law and fact involved, and make a summary order. *In re Neagle*, 135 U. S. 1. And in any case, an immediate writ would issue if it appeared that there was no provision of the common law or of any statute making the act charged an offense. See *Greene v. Henkel*, 183 U. S. 249, 261. But where, as in the principal case, an indictment makes a *prima facie* case, the court will confine itself to a determination of the other tribunal's authority over such a case as this appears to be on its face, and will not inquire into the constitutionality of the statute supporting the indictment, or the sufficiency of the charge. *Matter of Gregory*, 219 U. S. 210. The application of this general rule to the principal case made it unnecessary for the court to pass upon the interesting and long-mooted question of the power of Congress to compel witnesses to give testimony to be used as a basis for legislation.

INTERSTATE COMMERCE — CONTROL BY STATES — RIGHT OF FOREIGN CORPORATION TO ENFORCE IN STATE COURTS CONTRACTS ARISING IN INTERSTATE COMMERCE. — A foreign corporation sued in a state court to recover the price of goods shipped to a resident of the state in compliance with an order given to its traveling salesman. A state statute which denied the right to sue in the state courts to any foreign corporation which had not appointed a resident agent and filed certain reports, was construed by the state court to apply to this transaction. *Held*, that, so construed, the statute is an unconstitutional restraint upon interstate commerce. *Sioux Remedy Co. v. Cope*, 235 U. S. 197.

A statute of the same general nature being in force, a foreign corporation sued to collect a debt which arose from a similar sale. *Held*, that the statute does not apply to suits arising from interstate commerce. *American Art Works v. Chicago Picture Frame Works*, 264 Ill. 610, 106 N. E. 440.

The first case settles a previous conflict of authority by applying to these statutes the principle that a state may not, in exercising its right to impose conditions upon the admission of foreign corporations, thereby hamper inter-

state commerce. *Robbins v. Shelby County Taxing District*, 120 U. S. 489. See *Paul v. Virginia*, 8 Wall. (U. S.) 168, 182. Generally the courts have avoided this problem by holding, as does the second case, that the law in question applies only to suits arising from intrastate business. *Mearshon & Co. v. Pottsville Lumber Co.*, 187 Pa. 12, 40 Atl. 1019. Even when construed as in the first case, the statute has been sometimes considered valid. *Wilson-Moline Buggy Co. v. Hawkins*, 80 Kan. 117, 101 Pac. 1009. But the rule established by the first principal case has been adopted by several other courts, and seems plainly sound. *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931; *Murphy Varnish Co. v. Connell*, 10 N. Y. Misc. 553, 32 N. Y. Supp. 492. As to the general right to do interstate commerce, it is settled that such restrictions as were here imposed are invalid. *International Textbook Co. v. Pigg*, 217 U. S. 91. To put similar conditions precedent on the right to sue in the state courts indirectly hampers interstate commerce, by shutting off the foreign corporation from the normal mode of enforcing its rights against those with whom it deals. It is no more legitimate to require a choice between this hardship and the expense of complying with the law than to demand absolute obedience to the conditions of the statute. See 23 HARV. L. REV. 66.

INTERSTATE COMMERCE—CONTROL BY STATES—STATE TAX ON INTERSTATE C. O. D. SHIPMENTS OF INTOXICATING LIQUORS: WEBB-KENYON ACT.—A state statute imposed an occupation tax of five thousand dollars on each place maintained for handling liquors C. O. D. TEXAS, LAWS OF 1907, c. 4. The defendant pleads this statute as a defense to a refusal to deliver an interstate C. O. D. shipment of liquors made by the plaintiff. *Held*, that the statute is constitutional. *Rosenberger v. Pacific Express Co.*, 167 S. W. 429 (Mo.).

The holding of the principal case, that collections on interstate C. O. D. shipments are not part of interstate commerce, seems unsound, for the commerce clause of the Constitution has been broadly construed to include all dealings intimately related to the importation of goods or passengers from one state to another. *Buller Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1. Thus a license tax on firms shipping goods into the state C. O. D. has been held an unconstitutional regulation of interstate commerce. *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441. For the same reason a state statute prohibiting the delivery of any C. O. D. shipment of intoxicating liquors is unconstitutional. *Adams Express Co. v. Kentucky*, 206 U. S. 129. The tax imposed in the present case was so high as to amount to a prohibition of such shipments of liquors into the state, and seems clearly unconstitutional unless aided by the so-called Webb-Kenyon Act, to which the court did not refer. *Louisville & Nashville R. Co. v. Cook Brewing Co.*, 223 U. S. 70. In substance, this statute prohibits interstate shipments of liquor intended to be used in violation of the law of the state of destination. 37 U. S. STAT. AT LARGE, 699. See 27 HARV. L. REV. 763. Various constructions have been put on this act by the state courts, but the better view seems to be that it makes interstate shipments illegal only where there is an intent to use the liquors for a purpose unlawful by virtue of a state statute valid as an exercise of the police power independent of this act. *Southern Express Co. v. State*, 66 So. 115 (Ala.); *Palmer v. Southern Express Co.*, 165 S. W. 236 (Tenn.); *contra*, *Adams Express Co. v. Beer*, 65 So. 575 (Miss.). See 28 HARV. L. REV. 225. Accordingly, under this view, the federal law would not cure the unconstitutionality of the present statute.

LANDLORD AND TENANT—CONDITIONS AND COVENANTS IN LEASES—COVENANT TO REPAIR—RIGHT OF THIRD PARTY UNDER COVENANT.—The defendant leased a certain dwelling house to a tenant with a covenant to keep

the premises in repair. The plaintiff, the child of a neighbor, whom the court assumed to be an invitee, was injured by reason of the disrepair of the tenant's premises. *Held*, that the plaintiff can recover. *Flood v. Pabst Brewing Co.*, 149 N. W. 489 (Wis.).

Apart from an express covenant to repair, a landlord owes no duty either to a tenant or a third party to take care that the demised premises are safe. *Lane v. Cox*, [1897] 1 Q. B. 415; *Mellen v. Morrill*, 126 Mass. 545. Nor does a covenant to repair, as a general rule, render the landlord liable, even to the tenant, for personal injuries resulting from the want of repair. He is not liable in tort because it is a mere nonfeasance, nor in contract because the damages are said to be too remote. *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220; *Schick v. Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962. Third parties, of course, cannot sue on the contract as such. *Cavalier v. Pope*, [1906] A. C. 428; see *Burdick v. Cheadle*, 26 Oh. St. 393, 397. It is also generally held that strangers cannot recover from the landlord in tort by showing merely a breach of the contract to repair. *Frank v. Mandel*, 76 N. Y. App. Div. 413, 78 N. Y. Supp. 855; see *Shackford v. Coffin*, 95 Me. 69, 49 Atl. 57; *Burdick v. Cheadle*, *supra*. A recent Kentucky case reaches this result. *Dice's Adm'r v. Zweigart's Adm'r*, 171 S. W. 195. Some jurisdictions, however, allow a recovery on the theory of preventing circuity of action. See *Lowell v. Spaulding*, 4 Cush. (Mass.) 277, 279. This view seems to be untenable where the tenant cannot recover in contract from his landlord the damages collected from him by the injured third party, because of the remoteness of the damage. *Schick v. Fleischhauer*, *supra*. Other jurisdictions allow an invitee of the tenant to recover in tort on what is conceived to be an affirmative duty of due care to make the premises safe, arising out of the contract. This is the reasoning of the principal case. *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092. These cases seem unsupportable, since they confuse the liability arising from a breach of a duty imposed by law with a duty assumed by contract. See *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220. *Cf. Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708.

MECHANICS' LIENS — WAIVER OF LIEN BY CONTRACT BETWEEN MATERIALMAN AND CONTRACTOR. — By a written agreement between a materialman and the contractor, the materialman agreed not to assert his right to a mechanics' lien upon a building being erected for the defendant by the contractor. The defendant had paid the contractor more than was proper in view of the claims of materialmen, but did not learn of this agreement until suit was brought by the materialman to enforce his lien. *Held*, that the agreement did not constitute a waiver of the lien. *Massachusetts Bonding & Ins. Co. v. Realty Trust Co.*, 83 S. E. 210 (Ga.).

In the absence of estoppel, the question whether the materialman has waived his right to a lien is one of intention. *Johnson v. Spencer*, 49 Ind. App. 166, 96 N. E. 1041; *Lee v. Hassett*, 39 Mo. App. 67. This may be shown by acts inconsistent with the existence of a lien. *Green v. Fox*, 7 Allen (Mass.) 85. Or the materialman may waive his right by a contract with the owner. *Murray v. Earle*, 13 S. C. 87. But where there is merely a contract between the materialman and the contractor, as in the principal case, the owner is but incidentally benefited, and can take no advantage of the contract. Although there is an intention by the materialman to waive his lien, it would seem that it must run to the owner in order to be binding upon him as a waiver.

NEGLIGENCE — DUTY OF CARE — EFFECT OF VIOLATION OF STATUTE PROHIBITING THE EMPLOYMENT OF MINORS IN ELEVATORS. — The plaintiff's intestate, a boy less than eighteen years old, was allowed to run an elevator in

the defendant's department store, in violation of a statute which made it a misdemeanor to employ or allow persons under eighteen to operate elevators. While so engaged, he was crushed to death. *Held*, that the plaintiff can recover. *Beaver v. Mason, Ehrman & Co.*, 143 Pac. 1000 (Ore.).

The decision takes the ground that the violation of the statute by the defendant was the equivalent of negligence, and is undoubtedly sound. The statute was designed to prevent just such accidents as the one that occurred. Though the point is not discussed, the case also involves a decision that the boy's part in the violation of the statute does not bar the recovery, for the statute was designed to protect persons in his position, not to punish them, and its policy is such that any assumption of risk by the persons within its purview is forbidden. This follows the accepted view. *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 95 N. E. 876. For an extensive discussion of the principles involved in the case, see Dean Thayer's article on Public Wrong and Private Action, 27 HARV. L. REV. 317; see also 26 HARV. L. REV. 262.

NEW TRIAL — TIME WITHIN WHICH MOTION MUST BE MADE — EFFECT OF EXPIRATION OF TERM. — In a criminal proceeding, the defendant was convicted, and judgment entered. After the expiration of the term, it was discovered that one of the jurymen who served at the trial had been prejudiced against the defendant. This discovery could not have been previously made by the exercise of reasonable diligence. *Held*, that a new trial cannot be granted. *United States v. Mayer*, 235 U. S. 55.

For a discussion of the effect of the expiration of the term on a party's right to a new trial, see p. 412 of this issue of the REVIEW.

POWERS — NON-EXCLUSIVE POWERS — DOCTRINE OF ILLUSORY APPOINTMENTS IN UNITED STATES. — The testator devised land in trust for his son for life, with power to convey to his children "in such shares and proportions among them as he by his last will" should appoint, and in default of appointment to the children in equal shares. The donee of the power by his will gave ten dollars apiece to five of his seven children and the remainder of the proceeds of his real estate to the other two. He possessed no other real estate than that subject to the power. *Held*, that the will was a valid exercise of the power. *Crawford's Estate*, 62 Pitts. L. J. 536 (Orphan's Ct., Alleghany Co., Pa.).

Ever since the adoption of the modern rule allowing after-acquired realty to pass by will, general words of devise have been insufficient to exercise a special power of appointment, even though at the date of the will the testator had no other property than that subject to the power. *In re Mills*, 34 Ch. D. 186. A Pennsylvania statute, however, has established the contrary rule. See *Auber's Appeal*, 109 Pa. St. 447. Even under this statute the court would have been forced to hold the appointment invalid if it had applied the doctrine of illusory appointments introduced by the English equity court, which required the donee of a non-exclusive power to appoint to each of the class a substantial portion of the property. *Kemp v. Kemp*, 5 Ves. 849. England, however, repudiated this doctrine by a statute which provided that a non-exclusive power was validly exercised as long as each member of the class received some of the property, no matter how small a share. 11 GEO. IV. & 1 WM. IV., c. 46. A later statute removed this formal requirement and made non-exclusive powers equivalent to exclusive powers. 37 & 38 VICT., c. 37. In America, a few jurisdictions have recognized the doctrine of illusory appointments. *Thrasher v. Ballard*, 35 W. Va. 524. See 1 TIFFANY, REAL PROPERTY, § 288. But several other states in which the question has arisen, among them Pennsylvania, have wisely refused to adopt as a part of the common law a rule which proved so inadvisable in practice that it was long ago discarded by its creators. See *Graeff v. De Turk*, 44 Pa. St. 527; *Lines v.*

Darden, 5 Fla. 51, 81; *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885. The next step in the evolution of the subject in this country should be in line with the second English statute, for the doctrine of non-exclusive appointments introduces a mere technicality so long as it can be evaded by trivial gifts to the rest of the class. See 25 HARV. L. REV. 26.

PROXIMATE CAUSE — INTERVENING CAUSES — FORESEEABILITY: EFFECT OF VIOLATION OF STATUTE. — In an action for damages for negligent injuries, the plaintiff offered to prove that the defendant, in violation of a city ordinance prohibiting the sale of firearms to minors, sold a rifle and cartridges to a boy of fifteen, and that the boy accidentally shot the plaintiff with the rifle. *Held*, that a verdict was rightly directed for the defendant. *Hartnett v. Boston Store of Chicago*, 106 N. E. 837 (Ill.).

Upon common-law principles, the independent intervening act of a third person will not make a preceding cause remote if such act was foreseeable. *Lane v. Atlantic Works*, 111 Mass. 136; *Jennings v. Davis*, 187 Fed. 703, 711. This rule has been applied both to cases under statutes and, in their absence, to cases where foreseeable injury has resulted from firearms or explosives placed in the hands of third parties. *Dixon v. Bell*, 5 M. & S. 198; *Sullivan v. Creed*, [1904] 2 I. R. 317; *Carter v. Towne*, 98 Mass. 567; *Anderson v. Seltgren*, 100 Minn. 294, 111 N. W. 279; *Binford v. Johnston*, 82 Ind. 426. The principal case reasoned that since no proof of the foreseeability of the boy's act was offered, the defendant was not the proximate cause of the injury. It is submitted that the correctness of the decision depends upon the construction of the ordinance involved. If the ordinance was passed to avert danger to other people from firearms in the hands of minors, then, the harm having resulted by the very means through which the legislative body apprehended it, the defendant should not be permitted to negative causation on the ground that harm through this means was not foreseeable in the particular case. See *Pizzo v. Wieman*, 149 Wis. 235, 134 N. W. 899; see 27 HARV. L. REV. 319 *et seq.* Under this view the plaintiff would be entitled to a verdict on the facts offered. If, however, the ordinance is, as it would in fact appear to be, solely for the purpose of preventing injury to minors from firearms in their own hands, then the result of the principal case is justifiable. Under a similar statute another jurisdiction has reached the same result as the principal case. *Poland v. Earhart*, 70 Ia. 285, 30 N. W. 637.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — AGREEMENT IN CONTRACT OF SALE TO ENTER INTO RESTRICTIVE COVENANT — ENFORCEMENT OF SUCH AN AGREEMENT AS AN EQUITABLE SERVITUDE. — The owner of adjoining tracts of land contracted to sell one to the plaintiff, who agreed to covenant in the conveyance not to make any use of the premises offensive to the vendor, his heirs and assigns, which would lessen the value of the adjoining land as residential property. The vendor then conveyed the adjoining land to a third party, and later completed the conveyance to the plaintiff, who covenanted as agreed. The plaintiff contracted to sell to the defendant, who refused to perform on learning of the restrictive covenant. *Held*, that the plaintiff is entitled to specific performance, since the restrictive covenant is not enforceable. *Millbourn v. Lyons*, [1914] 2 Ch. 231 (C. A.).

Equity will enforce a restrictive covenant, irrespective of whether or not it runs with the land at law, against assignees with notice who are not parties to the covenant, if there is a clear intention to bind the land, and not merely the parties to the covenant. *Tulk v. Moxhay*, 2 Phil. 774; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359. The agreement need not be in the form of a covenant — a mere oral agreement is enough. *Parker v. Nightingale*, 6 Allen

(Mass.) 341. In the principal case no difficulty arises on the question of notice. Accordingly, if there was an intention to bind the land at the time of the contract of sale, equity should enforce the agreement in spite of the conveyance of the prospective dominant tenement to a third party before the completion of the contract. *Barrow v. Richard*, 8 Paige (N. Y.) 351. The court, however, decided against the existence of any such intention, partly upon the ground that preliminary agreements will not be considered when the transaction has been embodied in a formal instrument. *Leggott v. Barrett*, 15 Ch. D. 306. The view of American courts on this matter is more liberal, and it is quite probable that they would come to a different result on this basis. *Parker v. Nightingale*, *supra*. Not finding such an intention, the principal case seems correct in holding that the conveyance itself created no enforceable right. For such restrictive agreements really create equitable property rights, closely analogous to legal easements. *Peck v. Conway*, 119 Mass. 546. And legal easements cannot be created by deed in favor of a third party. See *Owen v. Field*, 102 Mass. 90, 115; *cf. Haverhill Savings Bank v. Griffin*, 184 Mass. 419, 68 N. E. 839. But see *Gibert v. Peteler*, 38 Barb. (N. Y.) 488, 514.

STATUTE OF FRAUDS — INTERESTS IN LAND — PAROL SURRENDER OF FINAL YEAR OF LEASE. — In consideration of the lessor's oral promise to pay a certain sum, the lessee orally agreed to surrender at the beginning of the year, the last year of a six-year lease. The lessor later repudiated the agreement on the ground that the state statute of frauds required "the creation, grant, assignment, or surrender of any estate or interest in lands other than leases for a term not exceeding one year" to be in writing. WIS. STAT. (1913), § 2302. The lessee now sues to enforce the lessor's promise to pay. *Held*, that he can recover. *Garrick Theatre Co. v. Gimbel Bros.*, 149 N. W. 385 (Wis.).

Before the statute of frauds any lease in possession could be surrendered by parol. *Gwyn v. Wellborn*, 1 Dev. & Bat. (N. C.) 313. See *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400, 405. Under the statute, even in the form which provides that "no lease, estate, or interest in land shall be surrendered unless by deed or note in writing," or by operation of law, the weight of American authority allows surrender by parol of terms creatable by parol. *Kiester v. Miller*, 25 Pa. 481; *Ross v. Schneider*, 30 Ind. 423. *Contra, Mollet v. Brayne*, 2 Camp. 103. Under the form of statute in force in the principal case, the validity of such parol surrenders is expressly recognized. Accordingly, as the statute clearly refers to the length of the term transferred, not to the length of the estate from which it was carved, a parol surrender of an unexpired year or less of a term should be valid. *Smith v. Devlin*, 23 N. Y. 363; but see *Kittle v. St. John*, 7 Neb. 73, 75. In the principal case, the surrender was to operate in the future. Under the ordinary form of the statute, however, a term for years may be created to begin in the future. *Young v. Dake*, 5 N. Y. 463; *Baumgarten v. Cohn*, 141 Wis. 315, 124 N. W. 288. Since a surrender is but a re-demise of part of the lease, the decision seems correct in holding that a surrender *in futuro* should be equally valid. *Allen v. Jaquish*, 21 Wend. (N. Y.) 628; see 2 REED, STATUTE OF FRAUDS, § 771.

STREET RAILWAYS — TORT LIABILITY — CONTRIBUTORY NEGLIGENCE DETERMINED BY RELIANCE ON OBSERVANCE OF STATUTORY DUTY. — The plaintiff, a truck driver, on approaching the defendants' tracks, looked for a car from a place where he had an unobstructed view far enough to see any car which could have reached him, if running at the rate of speed required by an ordinance. He then went on the track without looking again, and was struck by a car running at an illegal speed. The plaintiff offered no evidence to prove that he knew of the ordinance or relied upon it. The court below directed a verdict for the defendant. *Held*, that the directed verdict was

proper. *Voelker Products Co. v. United Rys. Co. of St. Louis*, 170 S. W. 332 (Mo. App.).

The case is particularly interesting as a vigorous denial of the fiction that a man is presumed to know the law, which grew up as an expression of the principle that ignorance of the law is no excuse. See *Regina v. Coote*, 9 Moo. P. C. N. s. 463; *Mackowik v. Kansas City, St. J. & C. B. R. Co.*, 106 Mo. 550, 571, 94 S. W. 256. In putting on the plaintiff the burden of proving his reliance on the defendants' performance of its statutory duty, however, the court seems to have gone too far in the opposite direction, and to have formulated a presumption that a man knows nothing about the law. According to the local law, the burden of proving the plaintiff's contributory negligence was on the defendant. *Bluedorn v. Missouri Pacific Ry. Co.*, 24 S. W. 57 (Mo.). And Missouri does not purport to follow the artificial Pennsylvania doctrine that a man who does not "stop, look, and listen" at the edge of the track is negligent as a matter of law. *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120, 124, 87 S. W. 578, 580. Cf. *Burke v. Union Traction Co.*, 198 Pa. St. 497, 48 Atl. 470. To entitle the defendant to a directed verdict, therefore, it was necessary to show conduct on the part of the plaintiff which could not reasonably be found consistent with due care. In the principal case, however, the only evidence before the court showed a course of action which might have been either careful or negligent, according as the plaintiff relied on the observance of the statute or not. *Baltimore & O. S. W. Ry. Co. v. Then*, 159 Ill. 535, 42 N. E. 971. The court's presumption of ignorance of the statute seems a strange one, for it is reasonable to suppose that a driver would be familiar with the speed laws of the city. See *Schmidt v. Burlington, C. R. & N. Ry. Co.*, 75 Ia. 606, 39 N. W. 916.

TAXATION — PARTICULAR FORMS OF TAXATION — NEW YORK TRANSFER TAX: TAXATION OF RIGHT OF SURVIVORSHIP. — The owner of stock in a certain corporation, by vote of the corporation, was entitled to the total net income for life, and had certain of the shares reissued to himself and another, and the survivor of them. This transfer was gratuitous, and the donor reserved the right to vote the stock as well as the right to annul the donee's interest during his life. The donor died after the passage of the Transfer Tax Act. *Held*, that the survivor's interest is taxable. *Matter of Dana Co.*, 164 N. Y. App. Div. 44.

The New York Transfer Tax law provides that any transfer of property intended to take effect "in possession and enjoyment" after the death of the donor shall be taxable. CONSOL. LAWS, N. Y., TAX LAW, § 220, subd. 4, 5. It is not necessary that the transfer be made in contemplation of death. See *Matter of Brandreth*, 169 N. Y. 437, 441, 62 N. E. 563, 564. But ordinarily a gift *inter vivos*, not made in contemplation of death, will not be taxable. *Matter of Spaulding*, 163 N. Y. 607, 57 N. E. 1124. See McELROY, TRANSFER TAX LAW, 2 ed., § 148. It has been held, however, that a gift of stock *inter vivos* is taxable where all the dividends, as well as the right to vote the stock, are reserved to the donor for his life, so that the gift is intended to rest in enjoyment after his death. *Matter of Brandreth, supra*. The test laid down by the courts, under a broad construction of the statute, is whether or not the enjoyment of the property by the transferee begins at or after the death of the transferor. The principal case, therefore, is clearly correct, although it might not be proper to reach the same result in the ordinary case of joint interests.

TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — PURCHASE OF A NAME BY A CORPORATION FOR PURPOSES OF UNFAIR COMPETITION. — Arthur A. Waterman had established a small and unsuccessful

fountain-pen business in competition with the complainant. The defendant corporation bought this business for the express purpose of employing the name in unfair competition. *Held*, that relief will not be given further than to require the defendant to use the name with the suffix "not connected with the L. E. Waterman Co." *L. E. Waterman Co. v. Modern Pen Co.*, 235 U. S. 88.

Previous to this decision the attitude of our courts toward a trader who seeks to draw to himself the profit of a predecessor in the business through a similarity of name has been most severe. Newly formed corporations must not imitate the legal cognomen of a rival. *Holmes v. Holmes, etc. Co.*, 37 Conn. 278; *Hendriks v. Montagu*, 17 Ch. Div. 638. Repeatedly where a dummy member has been taken into a corporation or partnership for the very purpose of making possible the unfair competition, the use of the name in any way whatever has been prohibited. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017; *Melachrino and Co. v. The Melachrino, etc. Co.*, 4 Pat. Rep. Eng. 215. Much of the former authority, furthermore, seems to regard it as immaterial that the individual from whom the name was secured had to a certain extent been actually engaged in the business. *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, *supra*; *Sawyer v. Kellogg*, 7 Fed. 720. See 12 HARV. L. REV. 243, 245. And when an enterprising but piratical manufacturer boldly changed his own name to match that of his competitor, its use by him was absolutely enjoined. *Pinet v. Pinet*, [1898] 1 Ch. 179. In contrast to all of this, it must be remembered that where the right of an individual to use his own name is involved the courts will never go further than to insist that he make an honest effort to prevent confusion in the public mind. *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. 903; *Walter Baker & Co. v. Baker*, 77 Fed. 181. The majority opinion in the principal case lays stress on this point, and holds in effect that the assignee corporation must stand on the same footing as would the individual himself. But a corporation is free to choose its own name, and if it takes a name with practically no desire but that of unfair profit, there are no personal considerations to hamper the court. It would seem, therefore, as though justice fell short if it did not make the piracy completely impossible. No amount of relief in the shape of accompanying suffixes can altogether eliminate confusion, and to the extent that it fails the defendant corporation, as the dissent points out, is able to consummate its fraudulent desire. See *International Silver Co. v. Rogers Corporation*, 67 N. J. Eq. 646, 60 Atl. 187. Instructive sidelights are thrown on the principal case by its report in the District Court. See 193 Fed. 242.

WITNESSES — SEQUESTRATION — DISQUALIFICATION FOR DISOBEYING SEQUESTRATION ORDER. — A witness remained in court in violation of a sequestration order, without the connivance of the party calling him. The trial court excluded his testimony. *Held*, that the ruling is correct. *Illinois Central Ry. Co. v. Ouland's Adm'x*, 170 S. W. 48 (Ky.).

Where a witness violates a sequestration order and remains in court, without the connivance or consent of the party calling him, the probable weight of authority holds it reversible error to exclude the testimony. *Friedman v. Myers*, 14 N. Y. Supp. 142; *Parker v. State*, 67 Md. 329, 10 Atl. 219; *Behrman v. Terry*, 31 Colo. 155, 71 Pac. 1118. Even under this rule, the fact that the witness has violated an exclusion order would, of course, affect his credit. See *Ferguson v. Brown*, 75 Miss. 214, 224, 21 So. 603, 605. It has been held, however, in accordance with the principal case, that exclusion of the witness is discretionary, even where the party for whom he testifies is not at fault. *Galveston, etc. Ry. Co. v. Pingnot*, 142 S. W. 93 (Tex. Civ. App.); *Thorn v. Kemp*, 98 Ala. 417, 13 So. 749. Against lodging this discretion in the trial court, it has been argued that an innocent party should not be deprived of

material testimony, but that the disobedient witness should rather be fined for contempt. See *Parker v. State*, *supra*. But whenever the presence of the witness during the other testimony is likely to prejudice seriously the opposing side, even though the jury have been instructed that the violation should impair the credibility of the testimony, the court should have discretion to exclude this evidence. In this event one of the two litigants must suffer, and it is just that the burden should fall on the party whose witness was disobedient. See 14 HARV. L. REV. 475, 492.

BOOK REVIEWS

THE CRIMINAL JUSTICE ADMINISTRATION ACT, 1914. By Neville Anderson. London: Stevens and Haynes. 1914. pp. 126.

The last volume of the English statutes, containing as it does almost entirely enactments dating from that fateful third of August, 1914, is apt to be of future interest much more to statesmen and historians than to lawyers and social reformers. It constitutes a most impressive body of war measures, dealing with finance, commerce, the defense of the realm, the security of food supply, the treatment of aliens, etc., etc. But even during those overwhelming days, a few acts, then in the process of legislation, reached passage, which are of importance beyond the exigencies of war time and of practical interest beyond the confines of England. Of these is the Criminal Justice Administration Act, 1914 (4 & 5 Geo. V, ch. 58).

This Act affects important changes in the administration of the criminal law in England. Its two main purposes are stated with summary accuracy in the title — "an Act to diminish the number of cases committed to prison [and] to amend the Law with Respect to the Treatment and Punishment of young delinquents."

The Prevention of Crimes Act, 1908 (8 Edw. VII, ch. 59), marked a decided change in the treatment of juvenile adult offenders (those between the ages of sixteen and twenty-one). The educative and preventive treatment of such delinquents, and the beginnings of a probationary system to make it effective, commenced by that Act, have now been extended. Juvenile adult offenders who have been sentenced to a payment of a fine may now be placed under the supervision of probation officers pending such payment and, before finally issuing a commitment for non-payment, a report of a probation officer as to the conduct and means of the offender is to be considered by courts of summary jurisdiction (Section 1 (3)). Even more important is the extension of the Borstal system (*i. e.*, industrial reformatory institutions for youthful delinquents). Under the Prevention of Crimes Act, 1908, sentences of detention in Borstal institutions could be imposed only in a limited number of cases. The present Act extends the scope of such detentions to every case where an offender is summarily convicted of an offense for which a sentence of imprisonment of one month or upwards, without the option of a fine, may be imposed, provided that such offender has been previously convicted or has failed to observe the recognizance on a previous discharge on probation and "it appears to the court that, by reason of the offender's criminal habits or tendencies or associations with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime" (Section 10 (1)). Experience has demonstrated that a longer period of detention and supervision is necessary to give the Borstal system a fairer chance

of proving itself than was provided by the Act of 1908. Therefore, the minimum period of detention has now been extended from one year to two years, and, after discharge from an institution, the supervisory authority of the prison commissioners is now extended from six months to one year (Section 11). While no change has been made in the extent of the juvenile court legislation embodied in the important Children Act of 1908 (8 Edw. VII, ch. 67, Section 111 *et seq.*), particularly so as to extend the age limit of children under its protection above the age of fourteen, in the light of the tendency manifested by the new Act it does not seem rash to express the belief that, when England will again be permitted to think beyond matters of national defense, English legislation will adopt the natural development of this subject indicated by our experience under the juvenile court acts of the more advanced States. (See Judge Mack on the "Juvenile Court" in 23 HARV. L. REV. 204.)

Notable improvement is made by the Act likewise in the treatment of adult offenders. Section 1 now makes it obligatory upon courts of summary jurisdiction to allow time for the payment of fines, subject to appropriate exceptions. It is interesting to note that this method of stimulating industry by enabling a delinquent to earn the means of paying his fine has been worked out by some of our federal judges under makeshift probationary systems without any machinery provided by law. Of course, such a method of administration should not depend upon the chance interest of an overburdened judiciary, but should be carefully worked out through legislation and through the necessary administrative personnel to help in its enforcement. Sections 12 and 13 of the Act confer new powers upon summary courts of jurisdiction in dealing with offenders by allowing "detention" in lieu of "imprisonment" in cases of short sentences, to wit, sentences for a less period than five days. Clearly this is a conservative recognition of the deep psychological fact that the social interest of the state as to certain delinquents is adequately enforced through detention, and that the stigmatizing implications of imprisonment involve in such cases a real loss to the community. Even in so rigorously practical an institution as the army this principle has been applied. In the case of certain military offenders, in the place of prisons, detention barracks have been established, and this system, under the administration of Judge Advocate-General Crowder, is showing most promising results. Of course, in all these matters we must go slow and be wary of general theory; no less wary when our humanitarianism responds to such theory. The problem here as elsewhere is to draw lines, not unalterable ones at that, based on dependable data.

The present Act makes other minor changes in criminal procedure and administration, all of which have been carefully indicated in the convenient annotations to the Act which Mr. Anderson has given us. One of these provisions (Section 17), empowering the Home Secretary to "appropriate either wholly or partially particular prisons within his jurisdiction to particular classes of prisoners," is apt to arouse the envy of American executives like the Governor of Massachusetts, — and with good reason. A proper overhauling and coördination of our prison systems to fit the need of the present generation is a pressing problem in many States.

F. F.

THE JUVENILE COURT AND THE COMMUNITY. By Thomas D. Eliot. New York: The Macmillan Company. 1914. pp. xv, 234.

"When is a Juvenile Court not a Juvenile Court?" This query, which forms the caption to one of the chapters in Mr. Eliot's book, might well have been applied to the entire volume. The functions of the Juvenile Court are

two, — probation, and the adjudication of disputed cases. Probation is a matter of administration and loses in efficiency when yoked to the judicial function. It properly belongs to the educational system in which it should form one link in a chain of many institutions calculated to care for all manner of children from prodigies to idiots. The judicial function is also misplaced in the Juvenile Court. It is bad in theory because the court is in reality adjudicating the rights of the parents to the child, not the rights of the child itself; it is bad in practice because the court is hampered by lack of jurisdiction over all the domestic relations. The judicial function should be given to a Domestic Relations Court of wide powers.

Thus is the Juvenile Court weighed and found superfluous, and its powers divided between the educational system and a greater court. The division would bring about a harmonious adjustment. The educational system would have complete control of every child, and only disputed cases would be brought into court. The judge would have full powers to make a satisfactory disposition of the case. To this analysis and its deductions it would be difficult to urge any substantial objection. Indeed, the only source of wonderment is that it has not been advanced, as an entire program, many years ago. Probably the only explanation is historical. When the idea that we were mis-handling our juvenile delinquents first transcended the minds of sociologists and found lodgment in the minds of laymen and humanitarian lawyers, the latter, in the characteristic American way of attacking cases and not problems, looked about for something concrete. The criminal court, because of its dramatic position, its brutality, its stigma, and the odor of common-law crimes clinging to it, proved to be the first guilty victim. There was no other court to take its place in the handling of juvenile delinquency. This led to the establishment of a separate juvenile court, and its judge was appointed custodian of the sacred milk of human kindness. This new function required the aid of deputies to see that it was wisely and properly dispensed, and so arose the system of official probationers. It is difficult to show cause why this purely historical union of judge and probationer should not be dissolved.

Professor Roscoe Pound has called this age a period of unification of the social sciences. In advocating the articulation of the educational agencies and the concentration in one court of all matters pertaining to the family, Mr. Eliot has read aright the spirit of the times. And inasmuch as the subject dealt with is one that vitally affects the future citizenship, — for even the most cynical Italian criminologists agree that the juvenile can, in part, be molded anew, — his book adds importance to wisdom. It is a valuable contribution.

H. B. E.

YEAR BOOKS OF EDWARD II; Vol. VI, 4 Edward II, A.D. 1310-1311. Edited for the Selden Society by G. J. Turner. London: Bernard Quaritch. 1914. pp. cii, 228.

After an interval the Selden Society returns to the Years of Edward II. This volume (being three years delayed in publication, for it is the volume for 1911) carries us a half-year farther on the slow journey through the reign. The text of the Selden Society's publications has long since come to seem less important than the introductions. So long as the introduction was Maitland's this was natural; and since his death the tradition continues in existence.

Mr. Turner, who carried the last volume of Maitland's work through the press, here undertakes the entire labor of editing. The text appears to be carefully formed by a collation of the manuscripts, the *apparatus* is ample, and the

translation accurate and readable. These good qualities we have been accustomed to find in "Maitland's Year Books."

In this volume, Mr. Turner, as we might have expected, makes an especially careful study of the various extant manuscripts. In particular, he compares the manuscripts of the first few years of the reign for the purpose of discovering their mutual relations and the identity or otherwise of their originals. This comparison is carried out in the minutest detail, with patience and authority; and doubtless Mr. Turner's conclusions are well warranted. Future commentators on the early Year Books will not need again to repeat his laborious work.

The principal part of Mr. Turner's introduction is an attempt to establish what he calls the "pamphlet theory" of the origin of the Year Books. He takes up, first, the old question, whether there were, as Plowden and Bacon and Coke say, official reporters who reported the cases now in the Year Books. His chief argument in favor of the old story is that "we can scarcely reject it as worthless" when we find it "accepted by Coke as well as by Bacon," though, as he admits, Coke and Bacon accepted it, a generation later, on Plowden's assertion, — an argument which will not approve itself to most lawyers to-day.

As to the "pamphlet theory" itself, Mr. Turner makes out a fairly strong case for his theory that the reports were issued term by term, then gathered together by years, and finally, after the immediate value of the reports as pictures of living law had passed, were collected and copied by reigns by the few persons who as profound students of law cared to know the doctrines of the past. This theory seems compatible with any of the theories as to the origin of the Year Books which have heretofore been suggested.

We thank Mr. Turner for an interesting and valuable addition to the Year Book series. J. H. B.

SELECT BILLS IN EYRE, A.D. 1292-1333. Edited for the Selden Society by William Craddock Bolland. London: Bernard Quaritch. 1914. pp. lxiii, 174.

In the second volume of his *Eyre of Kent*, 6 & 7 Edward II, Mr. Bolland discussed the nature of Bills in Eyre. The subject is one not merely of historic interest, but of present value as shedding light upon the problem of simplicity and informality in pleading. In this new volume Mr. Bolland returns to the subject, and prints a most excellent collection of bills, accompanied by the extract from the Eyre roll, and followed by a valuable glossary.

The bills were concerned with abuses of all sorts: non-payment of debts, breaches of contract, trespass, imprisonments, abductions, conspiracies, and miscellaneous wrongs. Pecuniary damages are sought, but injunctions also are requested. In fact, the Eyre seems to have constituted an embryonic court of equity. "The Justices in Eyre were more amply clothed with the King's *persona* than ever was a Chief Justice sitting in King's Bench. All that the King could do to right wrong his Justices in Eyre could do" (p. xvi.). The editor concludes, therefore, that the Bills in Eyre were prayers addressed to the extra-legal discretion of the Justices, who could thus remedy abuses that could not be reached by the common law. The introduction contains an interesting summary of the proceedings. For students of the social and economic history of the times, these bills are valuable authority.

In his introduction Mr. Bolland also considers the derivation of the word "bill," which he believes to be a shortened form of *libellus*, a document; and discourses briefly on the delivery of Bills in Eyre, of failure to prosecute, of the indorsement on the bills, and of the French of the bills.

The volume confirms the opinion that Mr. Bolland is a worthy successor of Maitland in the study of medieval legal documents. J. H. B.

COMPILED STATUTES OF THE UNITED STATES, 1913. Compiled by John A. Mallory. St. Paul: West Publishing Company. 1914. In five volumes. pp. ciii, 5686.

This work, like the Compiled Statutes of the United States, 1901, takes as its main structure the Revised Statutes of 1874. Following closely the headings of the titles, chapters, and sections in that revision, the compiler has inserted in their appropriate places, so far as this was possible without changing the wording of the statutes, all subsequent enactments. Provisions relating to new subjects of legislation have necessarily been placed under new titles, and chapters made to accord with the general scheme of the original structure. The new compilation thus formed contains all the laws, general and permanent in their nature, in force December 31, 1913. In harmony with its character as a work for convenient reference, all provisions which are local, special, temporary, or obsolete are omitted from this compilation, and all amendments are, so far as possible, incorporated into the text of the original acts. Copious annotations under the various sections, however, explain such omissions and either indicate the purport of the omitted language or refer to the provisions themselves in the Statutes at Large. Cross references to related, similar, or conflicting provisions are also of value in following the course of legislation upon any subject. The full and careful index in the fifth volume includes, besides the customary subject index, a cross index to the sections of the Revised Statutes of 1874, with a list of all amendments, repeals, etc., a chronological table of laws, a list of the provisions omitted from the compilation, with references to the Statutes at Large, and a table of acts cited by their popular names. As a work of convenient reference the compilation is certainly of great value, and the compiler deserves praise for his careful and thorough execution of it. Moreover, the publishers propose to keep this compilation up to date by publishing from time to time in the advance sheets of the Federal Reporter all Acts of Congress of a general and permanent character classified according to the divisions of the Compiled Statutes.

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INCOME TAXATION UNDER FEDERAL AND STATE LAWS. By Henry Campbell Black. Second Edition. Kansas City: Vernon Law Book Company. 1915. pp. xxxvii, 865.

THE INDIVIDUAL DELINQUENT. By William Healy. Boston: Little, Brown and Company. 1915. pp. xvi, 830.

LEGAL PRINCIPLES OF PUBLIC HEALTH ADMINISTRATION. By Henry Bixby Hemenway. Chicago: T. H. Flood and Company. 1914. pp. xxxvi, 859.

MENS REA. By Douglas Aikenhead Stroud. London: Sweet and Maxwell. 1914. pp. xxxiv, 352.

THE PAN-ANGLES. By Sinclair Kennedy. New York: Longmans, Green and Company. 1914. pp. ix, 244.

PRINCIPLES OF COMPANY LAW. By Alfred F. Topham. Fourth Edition. London: Butterworth and Company. 1914. pp. xl, 376, 41.

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NO. 5

INTERESTS OF PERSONALITY

[Concluded]

5. HONOR: REPUTATION ⁷⁰

WHAT might be called inviolability of the spiritual person is of no less importance, although much more difficult to secure legally. Men will fight in defense of their honor no less than in defense of their physical persons. Hence the most elementary of social interests, the interest in general security, demands that the one individual interest be secured no less than the other and for much the same reasons. The exaggerated importance of individual honor in primitive and in pioneer society illustrates this. In a condition of feeble law adequate securing of this interest, which is difficult to secure through law under any circumstances, is quite impossible, and the insistence of the individual on protecting and vindicating it for himself becomes a serious menace to the peace and order of society.

In determining the nature and extent of the individual interest in honor it is important to distinguish this interest from the individual interest in reputation as a part of one's substance or, in

⁷⁰ Westermarck, *Origin and Development of the Moral Ideas*, ch. 32; Post, *Ethnologische Jurisprudenz*, II, §§ 17, 103; Binding, *Die Ehre und ihre Verletzbarkeit*; Hess, *Die Ehre und die Beleidigung*; Eiselen, *Wesen und Wert der Ehre*; Sandoz, *De la protection du point d'honneur*; Bosc, *Essai sur les éléments constitutifs du délit civil*, 206 ff.; Bower, *Code of Actionable Defamation*, app. iii. I am indebted to Professor E. R. Thayer for many suggestions in connection with this section.

other words, as an asset. Lord Holt, in an action for malicious prosecution, said that one might maintain such an action for any of three sorts of damage: (1) "damage to the fame, if the matter whereby he is accused be scandalous"; (2) injury to his person by imprisonment; and (3) injury to his property by putting him to cost and expense unlawfully.⁷¹ The second is obviously an infringement of an interest of personality. The first may involve personality or substance, or both. It has been argued, however, that only the latter is involved. Thus Bower says:

"It may be granted that reputation in many respects differs from other forms of property and connotes certain ideas involved in the notion of 'person' or 'personality,' for . . . it is certainly a very special and strictly personal type of asset: it has some analogies, no doubt, to the right of the individual to his life, his limbs, or his liberty, which are all only 'property' in a somewhat metaphorical sense. . . . In so far, however, as individual honor, dignity, character, and reputation are recognized by the law as proper subjects of its protection and as being such that any injury thereto entitles the aggrieved party to the same forms of legal redress as the invasion of property strictly so called, it is permissible to consider these rights as assets, though assets of a somewhat peculiar description."⁷²

As to the proposition that the mode of legal redress for infringement of the right of reputation is the same as that employed for infringement of rights of property, it is enough to say that exactly the same mode of redress, — namely, an action on the case for damages, — is employed for any infringement of the right of physical or corporal integrity by an indirect injury. The point must be, therefore, that the interest, so far as the law recognizes it as a proper subject for protection, is essentially one of substance. Our law of defamation, a somewhat haphazard growth, representing the needs and the ideas of more than one time, does not admit of any rigorous analytical treatment. Historically it is quite false to treat the subject from the standpoint of a securing of interests of substance only. Analytically, if one takes the law as it is, much

⁷¹ *Savill v. Roberts*, 12 Mod. 208 (1692).

⁷² Code of Actionable Defamation, 275-276. Cf. the Oriental's view of the Englishman: "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." Kipling, *Dray Wara Tow Dee*, In *Black and White* (Outward Bound ed.), 4.

of it is consistent with Bower's theory, though, as will be seen presently, if we accept his view, there are logical anomalies from the standpoint of such a theory which proceed from recognition that an interest of personality is involved. The law of the non-English-speaking world recognizes an interest in honor as an interest of personality. Moreover, one's claim to a social and spiritual life is as clear as his claim to physical life. The respect of his fellows may be an asset, as his power to labor may be an asset. But in each case the highest and most real value may attach to the integrity of the spiritual person rather than to the power of economic employment. This may be true especially of economic employment of the confidence and regard of one's fellows. If securing the individual in his interest in maintaining his dignity and his honor, as parts of his personality quite as dear to him as the integrity of his skin, is dependent on the possibility of pecuniary assessment, it must be because of some inherent difficulty in securing such an interest legally, and not because the interest itself is essentially one of substance. If the two interests are closely connected, it is the more necessary to insist that they are fundamentally distinct. On the one hand there is the claim of the individual to be secured in his dignity and honor as part of his personality in a world in which one must live in society among his fellow men. On the other hand there is the claim to be secured in his reputation as a part of his substance, in that in a world in which credit plays so large a part the confidence and esteem of one's fellow men may be a valuable asset.

Many problems turn on the nature of the interest secured. Thus a juristic person can have interests of substance only. Hence defamation of a juristic person is only cognizable so far as the reputation of the association is an asset and is injuriously affected as such.⁷³ Again, the much discussed question of use of the name of an actual person in fiction requires similar distinctions. It may be, as in the well-known case of "Cape Cod Folks" in its original form, that actual individuals are so described by their own names or by what are substantially their own names as to be made ridiculous to their neighbors and subjected to contempt and humiliation. Here the interest of honor is involved. On the other hand it may be that the claim amounts to no more than one of prop-

⁷³ *Oram v. Hutt*, [1913] 1 Ch. 259.

erty in the name, which its bearer seeks to hold inviolate from any use by authors, even though no reference to him personally is made or suggested. As no such interest of substance, where the name has no value as property, is recognized, the claim ought to fail. Between the two are cases where the interest is one of personality analogous to that secured by the so-called right of privacy. A sensitive person may be disturbed mentally because he chances to have the same name as a character in a popular novel. But he might chance to have the same name as a murderer or as a notorious criminal and might be annoyed by the "chaffing" to which the coincidence subjected him. As has been seen in another connection, the law cannot be asked to protect sensitiveness to this extent.⁷⁴ One may have an odd or unusual name and so the coincidence may be striking. But there are obvious interests of great weight to be balanced against the individual interest here, and these, along with difficulties involved in the attempt to secure it by law, are decisive. Such cases, therefore, must come on the one side to an interest in substance, — and it is obvious that property in the name cannot be asserted in these cases, — or on the other side to infringement of an interest of honor by the humiliation of direct personal reference or obvious description of the individual.⁷⁵ Another point which requires the same distinction is the common-law doctrine as to publication, that is, the requirement that the defamatory matter be uttered or made known to some person other than the one defamed. As Bower says justly, this is "a corollary from the notion of reputation as property. . . ." ⁷⁶ Hence in the Roman law and in the law of continental

⁷⁴ Compare the case of defamation of the dead. "Damages will be given a man who is calumniated in his lifetime *because he may be hurt in his worldly interests*. . . . But the law does not regard that uneasiness which a man feels in having his ancestor calumniated. That is too nice. . . . If a man could say nothing against a character but which he could prove, history could not be written." Boswell, *Life of Dr. Johnson* (Birrell's ed.), IV, 25-26, quoted by Bower, *Code of Actionable Defamation*, 282. When the group of kindred were a recognized unit whose interests the law endeavored to secure, such a question might have been looked at otherwise. The honor of the kindred as a group might be involved. Now that the individual is the unit, the only interest is one in the mental comfort of the individual, which is obviously outweighed by the social interest in the free writing of history.

⁷⁵ See *Smith, Jones v. Hulton*, *Three Conflicting Judicial Views as to a Question of Defamation*, 60 *Univ. of Pa. Law Rev.* 365, 461, especially the French case in the appendix, 479.

⁷⁶ *Code of Actionable Defamation*, 294.

Europe, where the interest in honor, as an interest of personality, is regarded as well as the interest of substance, the requirement of publication does not obtain.⁷⁷ This is true also in Scotland, where the Roman view is followed.⁷⁸ That attempts to deal with this whole matter on the sole basis of an interest of substance err in omitting an important element is suggested by the struggle of courts to find publication in cases which obviously call for relief yet do not involve publication except in a strained sense.⁷⁹

How far has the interest in honor, as an interest of personality, been recognized by legal systems in the past? How has legal recognition of this interest developed? Primitive law, it will be remembered, treated all injuries to personality as injuries to the honor of the person injured. In other words, the only, or at least the chief, individual interest which it recognized was the interest of the freeman in his honor. Even property interests were treated from this standpoint in early law. For example, in the Roman law originally, an injury to another's slave, if actionable, was actionable on the ground of insult to the owner.⁸⁰ Systematic liability for injury to property as such came into the Roman law in the third century B.C. The primitive tendency was to treat all wrongs as injuries to personality, and all injuries to personality as insult. As has been seen, *iniuria*, which originally means "insult," was used in Roman law to designate all infringements of the interest of personality. But as they distinguished the interests involved, jurists came to recognize three different forms or types of *iniuria*. Those of the first type were called real injuries, that is, injuries to the physical person. Here, although the interest was originally regarded as one of honor, the law soon came to see that in truth it was an interest in body and life, in other words, an interest in the physical person. For such injuries the Roman law finally provided a pecuniary recompense to be fixed by the tribunal in view of the character of the injury and of the circumstances of the case, or in the older civil law of modern Europe honorable amends in the form of such apology as the

⁷⁷ Gaius, III, § 220; Dig. XLVII, 10, 5, § 9. See references in n. 70, *supra*.

⁷⁸ Bower, Code of Actionable Defamation, 463.

⁷⁹ *Delacroix v. Thevenot*, 2 Starkie 63 (1817); *Seip v. Deshler*, 170 Pa. 334, 32 Atl. 1032 (1895); *Fonville v. McNease*, Dudley Law (S. C.) 303 (1838); *Schmuck v. Hill*, 2 Neb. Unoff. 79 (1901).

⁸⁰ Dig. XLVII, 10, 15, § 35.

tribunal might require. Injuries of a second type are called symbolic injuries, that is, injuries to the honor or, as the Roman books said, to the dignity of the person. Examples of symbolic injuries are insulting words addressed to the person, insulting gestures, and the like. Here the injury is to the feelings of the complainant and the interest is an interest in his honor. In these cases the remedy might be a sum of money assessed by the tribunal as before, or in the older law of modern Europe it might be honorable amends. Injuries of the third type were called pecuniary injuries, that is, injuries to reputation, to credit, to social or business standing. Here there is injury to an interest of substance. In this case the remedy is reparation of the damage by such a sum of money as will compensate the person injured.⁸¹

In the new German code the matter is made very clear. Following the Roman law, the code requires intent to injure in the case of symbolic injuries. Where the injury is purely to the honor of the person there must be an intentional insult or intentional defamation. Here the remedy is a sum of money fixed in view of all the circumstances as in Roman law or publication of the judgment at cost of the wrongdoer.⁸² But if an untrue statement is made which is likely to injure the credit of the complainant or to injure his earning power, the German code makes the person who utters the defamatory statement liable at his peril for what he might have discovered by the exercise of diligence. In such a case, however, the only remedy is reparation for the actual pecuniary loss.⁸³ Thus the code recognizes that in this case the interest secured is an interest of substance, while in the former case it is an interest of personality. In truth our own law subconsciously recognizes something very like this in providing for punitive damages where there is a wanton wrong and limiting liability to actual damages in other cases. One should compare also the rule in slander requiring special damage, which amounts to requirement of injury to an interest of substance, except where the defamatory matter affected interests of substance on its face or contained a charge of crime involving corporal punishment by way of penalty and so endan-

⁸¹ Salkowski, *Institutionen des römischen Rechts*, § 154; De Villiers, *The Roman and Roman Dutch Law of Injuries*, 24.

⁸² German Penal Code, § 188; Schuster, *German Civil Law*, § 288.

⁸³ Schuster, *German Civil Law*, § 288.

gered liberty and infringed an interest of personality in the days of hearsay presentments by grand juries.⁸⁴

Next we may ask, How far is this interest, as one of personality, protected by law to-day? The extent of protection in the law of continental Europe has been indicated already. In our law the exigencies of the remedy and of the mode of trial have imposed certain restrictions, so that except as the interest in honor is protected by what have been called "parasitic" damages, it is for the most part regarded as one of substance only. But those who argue that the common law always treats reputation as an asset are compelled to recognize certain cases in which the law does not follow out the theory consistently. For example, in case of a wanton, intentional wrong the plaintiff may recover punitive damages in almost all jurisdictions. In this way juries are enabled to deal with cases of infringement of the interest of personality where actual damages, appropriate only to infringements of interests of substance, would afford no security. Another case, regarded by Mr. Bower as an anomaly, he states thus:

"In cases where there is no plea of defeasible immunity, and where, consequently, it is not material for the purpose of establishing such plea, or rather for the purpose of negating any case of malice set up by the plaintiff, to prove good faith on the part of the defendant, such proof will nevertheless justify a mitigation of the penalty which would otherwise be inflicted on the defendant, and this, of course, involves a diminution of the compensation to be awarded as the value of the plaintiff's reputation."⁸⁵

From the standpoint of reputation as an asset, as Mr. Bower says, the foregoing rules are "strictly speaking illogical." The second seems to result from an idea that the damages here are a punishment. Indeed a penalty inflicted on the wrongdoer may

⁸⁴ See the old refinements on this point in Bacon, Abridgment, Slander, B. Where the words import a contagious disease and so affect social relations or are prejudicial to one in his office or calling, interests of substance are involved on the face of the defamatory statements.

⁸⁵ Bower, Actionable Defamation, 285. Mr. Bower states as a third "anomaly" that "in support of a plea of justification the defendant may give evidence of facts tending to show not merely that the plaintiff in fact had no reputation to lose, but that his conduct has been such that he ought to have had none." *Id.*, 284. If this is a sound statement of the law, the result is out of accord with the theory of reputation as property only. But it seems without warrant in the authorities. *Thompson v. Nye*, 16 Q. B. 175, 180 (1850). See Wigmore, Evidence, I, §§ 79, 280.

well be the only practicable mode of vindicating the interests of personality of the wronged. The law of continental Europe proceeds chiefly in this way, although history has played a large part in the result, since the Roman actions *ex delicto* were penal.⁸⁶ It is possible that the second of the two supposedly anomalous cases may rest also upon a social interest that cranks and zealots speak their minds freely. But the latter explanation is hardly consistent with the doctrine of reputation as property, since it allows private property to be destroyed without compensation to effect a remote and conjectural public good.

Two points seem open to criticism in the treatment of defamation in the common law. One is the attempt to reach a definite measure of actual money compensation where the injury is purely to the honor or dignity of the person injured, on the theory that even here the interest secured must be treated as one of substance. In these cases the jurisdictions which do not permit punitive damages, but purport to require a limitation of recovery to actual damages,⁸⁷ attempt the impossible; and it may be questioned whether the common law does not in like manner attempt the impossible when it attempts an assessment of actual damages for mental anguish, mental suffering, and the like. As has been said, actual compensation in money is possible only where the injury is to an interest of substance. The attempt in our law to reach an absolute measure of damages in these cases grows out of the exigencies of trial by jury, and the margin of discretion in the jury in assessing damages in such cases hides the breakdown of the academic rules as to the measure of damage which are laid down in the charge of the court. The other point in which our law is open to criticism, — namely, our failure to extend preventive remedies to secure interests of personality, — has been discussed elsewhere.⁸⁸ It should be said, however, that practical considerations and the necessity of taking account of other interests make it peculiarly difficult to give adequate security to the individual interest in honor. So far as feelings and mental comfort are involved, all that has been said heretofore applies fully.⁸⁹ In addition, very important

⁸⁶ Liszt, *Deutsches Strafrecht*, 11 ed., §§ 95 ff.

⁸⁷ Massachusetts, Michigan, New Hampshire, Colorado, Nebraska, Washington. See Sedgwick, *Damages*, 9 ed., I, § 358.

⁸⁸ See *supra*, p. 362, particularly n. 62.

⁸⁹ See *supra*, pp. 362-365.

social interests in free speech, free criticism, and free confidential communication have to be weighed against the individual interest. These social interests will be considered in another connection.

6. BELIEF AND OPINION ⁹⁰

As an individual interest, the claim of the individual to believe what his own reason and conscience dictate and approve, and to express freely the opinions involved in such belief, is closely connected with the interest in the physical person. With good reason Spencer deduces it as a sort of free mental motion and locomotion.⁹¹ But it is also closely connected with a social interest in free belief and free expression of opinion as guarantees of political efficiency and instruments of social progress. Except as interference with free belief and free expression of opinion takes the form of interference with freedom of the physical person, it is probable that the social interest is the more significant. In our bills of rights, however, individual free speech is always guaranteed, as an individual natural right.⁹² In other words, we have been accustomed to treat the matter from the standpoint of the individual interest. Undoubtedly there is such an interest, and there is the same social interest in securing it as in securing other individual interests of personality. The individual will fight for his beliefs no less than for his life and limb and for his honor. Hence the social interest in general security is involved in any interference with the former as well as in interference with the two latter. Moreover, free exercise of one's mental and spiritual faculties is a large part of life. As civilization proceeds it may become the largest part. No one who is restrained in this respect may be said to live a full moral and social life. Thus the social interest in the moral and social life of the individual is also involved.

Recognition of the individual interest in free belief and opinion is relatively recent both in law and in morals. Nor is this interest

⁹⁰ Pollock, *Essays in Jurisprudence and Ethics*, 144-175; Mill, *On Liberty*, ch. 2; Stephen, *Liberty, Equality, Fraternity*, ch. 2.

⁹¹ Justice, §§ 73, 76.

⁹² The usual form is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N. Y. Const. (1821), art. vii, § 7.

everywhere recognized by public opinion. Press reports from time to time remind us that Mormon elders who preach nothing but the abstract doctrines of their faith are not always safe in every part of the country. Courts are frequently called upon to protect new, queer, or out-of-the-way sects from persecution by otherwise law-abiding communities.⁹³ Active intolerance of religious, economic, and sociological opinions not generally held by the community is common enough. *Lehrfreiheit* often has to be insisted upon against a strong popular feeling. But this feeling may have an important social interest behind it. For the individual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality. These interests may or may seem to require repression of forms of belief which threaten to overturn vital social institutions or to weaken the power of the state. In one way or another, moralists generally recognize some such qualification of the so-called natural right of free belief and free speech.⁹⁴

Historically, much that appears to be lack of recognition of the individual interest in free belief and opinion is rather an over-insistence upon the countervailing interest of the state in its personality or over-insistence upon the social interest in the security of some particular social institution. Almost all state persecution so called and most ecclesiastical persecution is to be explained in this way.⁹⁵ Moreover, this interest extends only to belief and opinion. When belief and opinion are put into action, limitations which apply to other action may well apply. For example, prose-

⁹³ *Commonwealth v. Arndt*, 2 Wheeler Crim. Cas. 236 (Pa.) (1802). Cf. *In re Frazee*, 63 Mich. 396 (1886); *Figg v. Hanger*, 4 Neb. Unoff. 792 (1903); *Beatty v. Gillbanks*, 15 Cox C. C. 138 (1882).

⁹⁴ Spencer, *Justice*, § 79; Paulsen, *Ethics* (Thilly's trans.), 698 ff.; Mill, *On Liberty*, ch. 2 (beginning). See Woolsey, *Political Science*, I, 272-274.

⁹⁵ For recent examples see the federal law as to alien anarchists, *Turner v. Williams*, 194 U. S. 279 (1904); also the Massachusetts red-flag law: "No red or black flag and no banner, ensign, or sign having upon it any inscription opposed to organized government, or which is sacrilegious, or which may be derogatory to public morals shall be carried in parade within this commonwealth." Mass. Acts & Resolves, 1913, ch. 678, § 2. See *Commonwealth v. Karvonen* (Mass.), 106 N. E. 556 (1914). As to the conditions arising from the considerable alien population in large cities which may require such legislation, see Train, *Courts, Criminals and the Camorra*, ch. 9.

cutions of polygamy were not prosecutions of belief or opinion as to plural marriage, but prosecutions of the act of plural marriage based upon a social interest in marriage as a social institution.⁹⁶ Again, the legal system ought not to interfere in any way with the views of persons who believe in healing by faith. But if these are carried into action in the form of neglect to provide for proper assistance to dependents or neglect to report contagious diseases, a countervailing social interest in proper care for dependents and in the general health as a part of the general safety may have to be considered and may be decisive.⁹⁷ A similar balancing of interests was behind the distinction which the books used to make between heresy and blasphemy.⁹⁸ The former has to do solely with belief and opinion. The latter may be a manifestation of the former. But if it goes further and actively disturbs the public peace or shocks the moral feelings of the community, social interests must be weighed over against the individual interest. The foregoing considerations apply also to political opinion. Under some circumstances the interests of the state in its personality may have to be weighed against the individual interest in free political belief and free expression thereof. This may mean that the social interest in the free development of the individual must be weighed with the social interest in the state as a social institution. Where men live congested in large cities, especially where there are great numbers subjected to severe economic pressure who are more or less ignorant of the local political institutions and more or less ignorant of the language in which the law is expressed, the danger of mobs, which are controlled by suggestion, may require confining of free expression of political opinions on certain subjects to times and places where such things may be discussed without grave danger of violence and disorder.⁹⁹

⁹⁶ *Reynolds v. United States*, 98 U. S. 145 (1878); *Davis v. Beason*, 133 U. S. 333 (1890); *Wooley v. Watkins*, 2 Idaho 555, 22 Pac. 102 (1889).

⁹⁷ *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903); *Reg. v. Downes*, 13 Cox C. C. 111 (1875). A good discussion of this matter from the standpoint of ethics may be found in Pollock, *Essays in Jurisprudence and Ethics*, 168-169.

⁹⁸ *State v. Chandler*, 2 Har. (Del.) 553 (1837); *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206 (1838).

⁹⁹ Several interests may enter into consideration in such cases, *e. g.*, the social interest in general security, *People v. Most*, 171 N. Y. 423, 64 N. E. 175 (1902) (publications inciting to murder); the social interest in security and good order in public places, *Fitts v. Atlanta*, 121 Ga. 567, 49 S. E. 793 (1905) (public meeting on the

Probably for other reasons, to be considered in another connection, it is impossible to deal legally with belief, which is an internal matter, so long as it is not manifested externally. As the law is a practical institution, it can deal only with acting, not with subjective states in and of themselves. But the manifestations of belief, as, for instance, in the case of political opinions adverse to the right of the federal government during our Civil War to coerce the states in rebellion, may so affect the activities of the state necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech.¹⁰⁰

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streets); *Anderson v. State*, 69 Neb. 686, 96 N. W. 149 (1903) (distribution of handbills on the street; in this case the social interest in general security was also involved through the danger from fire in a city); *Mashburn v. Bloomington*, 32 Ill. App. 245 (1889) (Salvation Army); *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224 (1889) (Salvation Army); the social interest in general morals, *State v. McKee*, 73 Conn. 18, 46 Atl. 409 (1900) (paper devoted to narration of crimes); *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938 (1896) (paper devoted to scandal).

¹⁰⁰ *Ex parte Vallandigham*, 1 Wall. (U. S.) 243 (1863). See also the opinion of Leavitt, J., *Trial of Vallandigham* (Cincinnati, 1883), 265 ff.

EX PARTE DIVORCE

THE term "*ex parte* divorce" is used herein to designate a proceeding in which the libellee is not domiciled within the jurisdiction, is not personally served with process within the state, and does not appear to defend against the libel. It is not used to describe a divorce rendered upon a hearing at which, although only one side was represented, jurisdiction over the libellee was obtained by virtue of his residence, or by personal service of process upon him within the jurisdiction, or by his voluntary appearance as a party to the litigation. The subject is one upon which there have been many conflicting ideas and a considerable uncertainty as to the state of the law. Some of its phases have come before the Supreme Court of the United States, and so far as the question is one of the existence and effect of a judgment, the law has been declared in several cases. But the decisions of that court leave a very broad field untouched, because of the theory that a divorce is not necessarily the result of a judicial proceeding. It is the purpose of this article to attempt to show that enough has already been decided to lead logically and justly to the further conclusion that all *ex parte* divorces are invalid everywhere, save only those granted in the state having exclusive jurisdiction of the marital status, and that those of the last named class are valid everywhere.

Slowly, but in one of the late cases quite definitely, the real subject of contention has appeared. It is the nature and attributes of the *res* called the marital status. There is no adequate discussion of the topic in the earlier cases, and the law relating to it has developed rather by chance, as from time to time some point incident to the subject came up for decision. Unless the present sentiment of the bar throughout the country is greatly at fault, the last word upon the subject has not been said. The best that can be claimed for the present situation is that the status of an *ex parte* decree of divorce is somewhat uncertain.

Eight years ago the Supreme Court decided the case of *Haddock v. Haddock*.¹ The decision was generally regarded as marking a

¹ 201 U. S. 562 (1906).

wide departure from the earlier authorities upon the subject of divorce jurisdiction. More especially it appeared to many to deny the rule laid down in *Atherton v. Atherton*² five years before the decision of the Haddock Case. Roughly speaking, the Atherton Case seemed to give some countenance to the idea of extra-territorial validity for an *ex parte* decree of divorce, when jurisdiction over the *res* was debatable; while the Haddock Case, upon quite similar facts, denied to such a decree the protection of the "full faith and credit" clause of the Constitution of the United States.³ It established the rule that the mere domicil of one spouse within a state is not sufficient to give jurisdiction so as to make a decree of divorce, rendered without appearance of the libellee in the suit or personal service upon him within the state, a judgment within the meaning of the Constitution.

Predictions of dire results to follow from the decision were not wanting. They were in the first instance voiced by the dissenting members of the court. Much emphasis was laid upon the idea that many innocent persons would be made to suffer unjustly. Children would be bastardized, and supposedly lawful relations rendered meretricious. And on the other hand there was equally earnest commendation of the decision. It was hailed as a welcome sign that "the divorce evil" was no longer to be permitted to run rampant. It had put a needed check upon easy divorce. In one thing supporters and critics agreed. Both assumed that the decision was to have a far-reaching effect. It was the consensus of opinion that, either for good or for ill, a great landmark in our jurisprudence had been set up.

It was not long, however, before it appeared that the decision was not as drastic as it at first seemed. Its mandate was not a positive command to the several states. Instead of saying, "thou shalt not," it merely says, "you are not obliged to." The *ex parte* divorce was not one which must be recognized abroad, but if it were so recognized, no one could complain. The states might recognize it if they desired to do so. Accepting this method of continuing the theretofore general practice, and recognizing such decrees as matter of grace though not of right, the states have largely nullified the decision. At least, they have avoided its effect in many instances.

² 181 U. S. 155 (1901).

³ Art. IV, § 1.

In a few states, of which New York is the most prominent example, advantage has been taken of the power declared by the decision, in some degree. It has been used to prevent the circumvention of the limited divorce laws of that state. As a practical proposition it is true that, save in that state and in Pennsylvania and the Carolinas, the results of the decision have been inconsiderable. The law has been administered almost precisely as it was before. Considering results only, and not the mental process by which the results were arrived at, it may be said that the condition remains exactly as it was eight years ago. Courts which before recognized a large class of foreign divorces because of a belief that such course was made obligatory upon them by the Constitution, now reach the same result because of the opinion that sound public policy requires it.

The reason for this somewhat unexpected result is not far to seek. It has followed inevitably from the announced conclusion that divorce proceedings are not necessarily judicial. Because it took this view, the Supreme Court at once reached the limit of its power in these cases. Had the controversy been over the title to a horse, the court both could and would have gone further. It would not necessarily have stopped with the decision that New York was not bound to respect the Connecticut decree, unless it chose to do so. The decision would have been that New York could not give the decree effect, even if it so desired. More than that, it would have been held, if the question had arisen, that Connecticut could not treat the decree as valid. A man's title to his horse is protected by the Constitution of the United States, but his title to his marital rights is not.

This proposition was first announced by the Supreme Court in *Maynard v. Hill*.⁴ The question there related to the validity of an act of the territorial legislature of Oregon, declaring that one Maynard was thereby divorced from his non-resident wife. The litigation was over certain lands in Washington (formerly a part of Oregon), and title was claimed by the wife's heirs, upon the ground that the legislative act was invalid. The question of the extra-territorial effect of the act was not considered, nor was anything said as to whether the decision was to be confined to persons

⁴ 125 U. S. 190 (1888). From this conclusion Justices Matthews and Gray dissented.

and rights within the territory. The holding was that it was within the power of the legislative body to grant the divorce, and that the wife's future rights in these lands were thus ended.

The decision is not questioned by the majority of the court in the Haddock Case. Limiting the effect of the act to the state where it was passed, the soundness of the proposition is declared to be beyond question. If this had been thought to be a vital point in the Haddock Case, it may fairly be assumed that the doctrine of the Maynard Case would have been thoroughly reexamined. But this point was not deemed to be in issue in the later case. If the true limitation of the Maynard Case was correctly stated in the majority opinion in the Haddock Case, there was no occasion to consider further the Maynard Case. It did not apply. If, on the other hand, the minority in the Haddock Case were right, and the Maynard Case means that a legislative divorce should be given effect generally and not merely locally, then, as they say, the case is an authority for their position. If divorce were a proper subject for legislative action in the specific instance, the legislature might delegate the function to its agency, upon the same principle that it delegates its rate-making power. If the *ex parte* legislative divorce were valid extra-territorially, equally so would be the *ex parte* divorce granted by the duly authorized legislative agency.

It is to be regretted that the majority did not discuss the question whether, in view of their decision as to the nature of the marital status, — the *res* which was the subject of litigation, — it did not follow that the Maynard Case was decided wrongly, and dispose of its authority in the instant case in that way, or upon the ground that the Fourteenth Amendment now requires a different rule, rather than by declaring that a legislative divorce is of local effect only. But this was not done. The fact remains that the court, having declared in the Haddock Case what the Maynard case was not, had no occasion to go further and state what it was. The extra-territorial effect of the act having been denied, there was no occasion to inquire whether it had any local efficiency. The first point having been decided, the second was thereafter immaterial, and the remarks upon it may fairly be classed as *dicta*. They throw no light upon the question whether the *ex parte* Connecticut decree was a judgment entitled to protection under the "full faith and credit" clause of the Constitution.

The subject of divorce by act of the legislature has recently received consideration in the Review.⁵ It is there pointed out that the "equal protection of the law" clause was not applicable to the act of the territorial legislature considered in the Maynard Case. The legislation was by a creature of Congress, not by a state; and the act in question was passed before the amendment to the Constitution was adopted. Judge Baldwin's position, that legislative divorce is so contrary to the spirit of our institutions that it should be held to be prohibited by the Fourteenth Amendment, is strongly supported by the reasoning of the late Chief Justice Doe.⁶

⁵ "Legislative Divorce and the Fourteenth Amendment," by Simeon E. Baldwin, 27 HARV. L. REV. 699.

⁶ In an opinion prepared shortly before his death, Judge Doe discusses what is meant by equal laws. Although, upon the facts in the particular case, — *State v. Griffin*, 69 N. H. 1 (1896), — his reasoning failed to convince his associates, it seems worthy of preservation. It is quoted here at some length because it is not otherwise available. "With no requirement of uniformity, there might be ten systems of criminal and civil law in our counties; there might be hundreds of complete codes of so-called New Hampshire law (one for each town), governing all the relations and rights and duties of mankind, and as different as the laws of Maine, Georgia, Mexico, Europe, Asia, and Africa. If the state could be legally reduced to this condition, we should search the constitution in vain for a clause forbidding the enactment of hundreds of thousands of codes, one for each family or person, with all possible differences and contrarieties. It might be enacted in express terms that the malicious and premeditated killing of A. by B. should be a capital offence, and that the similar killing of B. by A. should not be criminal. . . . Instead of equal rights, there could be all the inequalities that human ingenuity could devise.

"This would not be a state of law in the sense explained by Blackstone, and by the reservations of the bill of rights which limit and define the legislative power vested in the senate and house by the second article of the constitution. Without uniformity there is no equality. Without equality there is no law in the constitutional sense in which the word 'law' is used in this state. . . .

"The common law is uniform. A right to make reasonable use of brooks and rivers is a part of the land title of all riparian proprietors. The tributaries of Lake Massabesic are not an exception. The defendant . . . has the rights of a riparian proprietor. . . . At common law . . . the question whether his throwing sawdust into the brook was a reasonable use of the brook is a judicial question of fact. . . . If his sawdust became a nuisance, there would be ample remedy in equity without a statute. . . . But on a bill in equity, as in a suit at law, the defendant is entitled to be heard before the value of his property is seriously impaired by a judgment. The opportunity to be heard, which is a part of the definition of a judicial proceeding by which rights are determined, is not an element of legislation. Statutes can be enacted without a hearing and without notice. . . . If one of two riparian proprietors, A., can obtain a perpetual injunction from the legislature against the use made by his neighbor, B., of a stream flowing through their lands on the ground that the use is unreasonable,

Although the Fourteenth Amendment had no application in the Maynard Case, it is of interest to note that, at the same time that

how can it be held that all judicial questions are not determinable in the same way? It is a course that has great advantages for favored and powerful persons. One who can obtain final judgment against his neighbors *ex parte* occupies a peculiar position. If all judicial questions can be decided by the legislature, they can be decided without either party being heard, and the theory of legal rights heretofore supposed to be indisputable gives way to the doctrine that any one having a judicial question with his neighbor has a choice of remedies. He can go to court, have the defendant notified to appear when a fair trial can be had, or he can apply to the legislature, who can if they choose, without a trial, render a decision in the form of a statute that will be as conclusive as a judicial judgment. . . .

"A state law selecting a person or class or municipal collection of persons for favors and privileges withheld from others in the same situation, and selecting one or more riparian proprietors on one pond and its tributaries for deprivation of the right of a trial of a question of fact involving a part of their land title, and leaving that right undisturbed in all other proprietors in the same situation is at war with a principle this court is not authorized to surrender.

"Uniformity and equality of rights are necessary for the safety of every citizen. It would be comparatively easy to invade the rights of a feeble person, a feeble party, or a feeble sect, if uniformity and equality were not an element of law in the legal sense. . . .

"If the power of discrimination can be exercised by special laws, no one knows how soon he and his neighbors may become the victims. Without equality nothing is secure. The settled constitutional right of equal privileges and equal protection under general laws rests on incontestable grounds of wisdom and necessity. The equal protection of the laws recently inserted in the federal constitution has been a New Hampshire doctrine 110 years; and it has been maintained here in a breadth of meaning and a scope of practical operation unknown elsewhere. The New Hampshire view is more nearly expressed in the dissenting opinions in the Slaughter House Cases, 16 Wall. (U. S.) 36 (1872), than in the opinion of the majority. . . .

"In *Rice v. Parkman*, 16 Mass. 326 (decided in 1820) it was held that the legislature, by a special act, can license the sale of a minor's property by his guardian, notwithstanding the power of a court to grant the same license. This rule, adopted in Massachusetts seven years before the opposite doctrine was held here, has been generally adopted in other states. *Rice v. Parkman* is the leading case. *Cooley*, Const. Lim., 115-122. It is to be noticed that our constitution which was held in 1827 (Opinion of the Justices, 4 N. H. 572) to require uniformity and equality in the rights of guardians to sell their wards' property, and therefore to prohibit a legislative grant of authority in a particular case, is a copy, in all material points, of the Massachusetts constitution under which the contrary was held seven years before. And when we consider that the Massachusetts doctrine has been generally adopted throughout the Union in preference to ours, and that special legislation on all subjects became so great an evil as to require a prohibition of it by a constitutional amendment, we have a view of the question whether it is expedient to reverse our course and bring in the evils of special legislation that have been found unendurable in other states, for the purpose of putting the people in this state to the trouble of reversing our error by constitutional amendment. . . .

"An examination of the authorities shows an unconstitutionality of unequal

case was decided, Mr. Justice Field, who delivered the opinion of the court, had occasion to define the scope of the amendment in another case. "The inhibition of the amendment: that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."⁷ It would seem that, if the Maynard Case had been among those to which the amendment might apply, the language above quoted would afford reasonable ground for contending that the act was unconstitutional.

Because there is a right to regulate marriage and the marital status, it seems to have been assumed that the rights directly involved are wholly public. While care has frequently been taken to point out that legislative divorce cannot affect vested property rights, no consideration has been given to other private rights which are inevitably destroyed by a decree of divorce. Yet there is probably no jurisdiction in this country in which these rights are not recognized.⁸ Even those states which deny a remedy for the mere alienation of the affections of a spouse⁹ recognize the wrong done by abduction or debauchment.¹⁰ The rights included under the general designation of the *consortium* are not only of the highest consequence in fact, but are recognized in law as well. No doubt these rights may be forfeited by wrongdoing or may be modified by general laws. They should not be taken from one man when they would not be from another under like circumstances.

rights in this state, and their constitutionality in other jurisdictions, state and national, to such an extent that on a question of this kind the authorities that maintain inequality elsewhere are entitled to no weight here. . . . Admit for the purposes of the argument all that may be said of the peculiarity of the New Hampshire doctrine of constitutional equality. And admit that it is wrong and opposed to the common welfare and that despotic power with boundless partiality and discrimination as practiced in various regions of the East is more conducive to the interests of the community, and that the constitutional amendments prohibiting special legislation in other states are mistakes that ought to be corrected. All this, taken for granted, would not affect this case. . . ."

⁷ *Pembina Consolidated Silver Mining and Milling Company v. Pennsylvania*, 125 U. S. 181, 188 (1888).

⁸ The proposition is concisely stated by Mr. Justice Braley in *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890 (1906). ". . . the civil institution known as marriage, but which as between the parties is treated as a contract."

⁹ *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843 (1899).

¹⁰ *Bigaouette v. Paulet*, 134 Mass. 123 (1883).

Their forfeiture should not be declared by a legislative *fiat* dealing with the individual case. It should result only from the application of a rule of law governing all who are similarly circumstanced, and the existence of the necessary circumstances should be established by a judicial trial of the facts.

If it be conceded that legislative divorce is prohibited by the Fourteenth Amendment, it follows that *ex parte* divorces granted by judges are likewise invalid in so far as their validity depends upon a delegation of legislative power. The infringement of right is not made less by calling the proceeding judicial rather than legislative. To be sure, the official making the decree is called a judge, but his order is not a judgment. He conducts a hearing, but it is not a trial in the constitutional sense.¹¹

But even if it be conceded that legislative divorce is not an infringement upon the constitutional rights of one of the parties, in that it denies him the equal protection of the laws, or in that the proceedings should be judicial under the "due process of law" clause, yet, as before suggested, there is another objection to it in many cases. The legislature can act only upon persons and things within its jurisdiction. The New Hampshire legislature cannot regulate the use of the streets of Boston. This objection applies alike to legislative and *ex parte* divorces. It does not reach every case, for there might be a legislative or *ex parte* divorce when the marital status was within the jurisdiction. With this class we are not at this moment concerned. If it is true, as the court clearly decided in the Haddock case, that the marital status is indivisible and that its *locus* is what for convenience is called the matrimonial domicile, then it must follow that no court or legislature can act upon it save that of the state where such domicile is found to be.

The logic of the basic conclusion in the Haddock Case leads directly to this conclusion. The subject matter of divorce litigation is not the status of one spouse towards the other. It is much more than that. It is the relation each spouse sustains towards the other. There is a joint relation to a common fact. If the fact

¹¹ The position of the dissenting justices in the Haddock Case is not entirely clear on this point. Mr. Justice Holmes says (p. 632): "I am unable to reconcile with the provisions of the Constitution, article 4, par. 1, the notion of a judgment being valid and binding in the state where it was rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of these states." But the decision in that case is that the Connecticut decree was not a judgment.

ceases to exist, the relation of both parties to it, and through it to one another, perishes also. It is the merest quibble to assert that the state deals with the status of its own citizen only and leaves that of the non-resident untouched. As well say to a Siamese twin: "I only sever you from your brother; but, you understand, I do not sever your brother from you, for I have no power over him or over his relation to you." The bond is a common one, and its severance affects both parties alike. What is demanded is not jurisdiction over one party or his status, but jurisdiction over the bond which is common to both of them. Before a state can act as to this status either through its courts or its legislature, the *res* must be within the jurisdiction of the state.¹² By a process of inverted reasoning it has frequently been concluded that these undoubted propositions show that any court having jurisdiction over the domicil of one spouse has full authority over the marital status of both. Because the decree divorcing A. from B. must affect B.'s relation to A., it has been argued that therefore the court had jurisdiction over B.'s status, even though B. never came within the jurisdiction and confessedly was domiciled in another state which had jurisdiction of his status.

Not only is the theory of the unilateral effect of an *ex parte* divorce unsound, but there has never been any general attempt to put it into practice. *Maynard v. Hill*¹³ cannot be limited to affecting the citizen in whose favor the action was taken. That was a suit by the heirs of the non-resident against whom the act was aimed and over whom the territory had no jurisdiction. Yet the act was held to be effective as to them, probably for the manifest reason that if it were not so it would not be of any value as to anyone. If it gave Maynard's heir future rights in property, it as certainly took them from his wife and her heirs. Unless it took something from them, it had nothing to give to him. This view of the situation finds partial expression in the Haddock Case. But it is only partial. It is there plainly laid down that the marital status is the subject matter of divorce litigation, and that the status is indivisible so far as jurisdiction is concerned. That status, upon the facts

¹² The statement in the Haddock Case (p. 569), that if a state "has acted concerning the dissolution of the marriage tie, as to a citizen of the state, such action is binding in that state as to such citizen," should be qualified. Jurisdiction over the party is not enough. There must be jurisdiction of the marital status also.

¹³ 125 U. S. 190 (1888).

considered by the court, was in New York. Hence it follows, not merely that Connecticut had no jurisdiction which could be exercised to affect things extra-territorial, but that it had no jurisdiction to act upon the subject at all.

This disposes at once of the anomalous situation which the majority concede and the minority rely upon in that case. It denies that one state may declare the husband divorced for his wife's desertion, while another state gives the wife a divorce for the husband's cruelty. One state, and one only, has jurisdiction of the subject. The race of diligence, commended by the minority, is displaced by an orderly inquiry into the jurisdictional facts. The two divorces, each valid locally and neither valid elsewhere, save by the courtesy of a sister state, which are allowed by the majority, are supplanted by one divorce, valid everywhere, or by a decree whose invalidity may be demonstrated in the state of its rendition as well as in foreign jurisdictions.

It is sometimes a hard task to hew to the line. Now and then it requires the sacrifice of much that is apparently valuable. And the line of the sound rule of law is not merely a fine-spun thread of logic. It must have substance, observable by him who is called to work by it. In other words, it must have a stout strand of reasonableness entwined with its logic. Assuming for the moment that this is such a line, does it call for the destruction of valuable material, or only for the removal of the irregularities frequently incident to growth? How much would following it to the conclusion indicated affect the declared law?

Five decisions of the Supreme Court are to some degree in point upon this question. Distinguishing what has been decided from what has been said, no others appear to be involved. The Maynard Case has already been discussed.

In *Cheever v. Wilson*¹⁴ there had been a divorce granted upon the wife's libel, in which she alleged her domicile and the misconduct of her husband. The husband appeared in that suit. Objection was made to the validity of the decree in a proceeding involving the title to property. It was held, first, that the objection to the decree was not properly pleaded; second, that if the decree was valid in the state of its rendition, it was so everywhere; third, that if the question of the *bona fides* of her residence could be in-

¹⁴ 9 Wall. (U. S.) 108 (1869).

quired into, there must be evidence to overcome the recitals of the decree, which evidence was then lacking; and fourth, that she could acquire a separate domicile when "necessary or proper," at which domicile divorce proceedings could be instituted. The decision that the decree was either valid or invalid everywhere is evidently based upon the idea that the proceeding was of necessity judicial. In this the case is an authority for the propositions herein advanced and runs counter to some observations in the Haddock Case. If the necessary and proper occasion for the acquisition of a separate domicile by the wife means that the husband's misconduct entitles her to change her domicile, and with it the matrimonial domicile, it supports the same views on this point also. If the occasion included a separation by mutual consent, as much could not be claimed. The nature of the occasion is not discussed by the court. It appears, however, from other cases that the occasion referred to is only that which gives her power over the matrimonial domicile.¹⁵ The question when and how the jurisdictional issue can be raised is not considered.

The cases next in order of time are *Atherton v. Atherton*¹⁶ and the Haddock Case. The Atherton Case was decided upon the ground that the court of the matrimonial domicile has jurisdiction over the subject of divorce. With that much no one has differed. But what facts settle where the matrimonial domicile was? In what tribunal can those facts be adjudicated? Here is the difficulty with the case. The question is hardly noticed in the opinion. It seems to be assumed that because Kentucky was once the *situs* of the marital status, therefore it continued to be so after the wife had left her husband for just cause and had acquired a domicile in New York. No doubt the court of the matrimonial domicile has jurisdiction, if the reasonable statutory provisions for such notice as can be given are complied with; but more light is needed upon the nature and qualities of the domicile of matrimony. Although the question is fairly involved in the Haddock Case, this aspect of it is not considered. Its attributes are sought by a process of delimitation. The earlier cases are treated as establishing certain boundary points, rather than as guides to the formulation

¹⁵ *Barber v. Barber*, 21 How. (U. S.) 582, 595 (1858); *Cheely v. Clayton*, 110 U. S. 701 (1884).

¹⁶ 181 U. S. 155 (1901).

of an underlying principle. In that case the original matrimonial domicile was in New York, and it was decided that the deserting husband did not take it with him to Connecticut. But why this result was reached without overruling the holding in the Atherton Case, that the abusive husband kept the domicile with him in Kentucky, is not stated. It seems plain that consistency required the overruling of the former case in the later one, so far as the former held that the domicile remained with the guilty husband.

The objections to the decision in the Haddock Case, and its point of conflict with the Atherton Case, are strikingly presented by passages in the dissenting opinion of Mr. Justice Holmes. He says: "The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicile remains so that the domicile of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power. Of course this is pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicile, he is equally powerless to keep her domicile there, if she moves into another state."¹⁷ If the idea that the fact as to who was the deserter is of importance as to the state of the domicile be pure fiction, it is so only in the sense that many rules of law are.¹⁸ It does not require the citation of authorities to establish that this fact has many times been held to be of controlling importance, as in determining the power of the wife to acquire a separate domicile generally, or of her taking her husband's credit with her. It can well be argued that the rule rests upon a substantial basis of fact. The man is lord of the *domus* so long as he rules lawfully; but when he departs from the law, he is no longer king.

The apparent inadequacy of the rule results from the failure of the majority to declare, as they in substance hold, that there was error in the Atherton Case. A little later in his opinion Judge Holmes makes this still more evident. "I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicile because the domicile of the wife does not

¹⁷ *Haddock v. Haddock*, 201 U. S. 562, 629 (1906).

¹⁸ "Domicile is an idea of the law." *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307 (1868).

follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicile if in consequence of her husband's conduct the wife has left the state. But *Atherton v. Atherton* decides that it does not."¹⁹

"An articulate indication of how it is to be distinguished"²⁰ is still lacking. The statement of the majority that the *Atherton* Case deals with "an unjustifiable absence" of the wife from the matrimonial domicile would dispose of it as an authority against the *Haddock* Case. But the limitation is clearly unwarranted, and a broader ruling, according with the minority view of what the case decided, was actually made. In a later case,²¹ and in an opinion written by a justice who had not participated in the former decisions, the same course is pursued as in the earlier cases. The husband who deserts does not take the *res* with him, if he goes out of the state, but he keeps it if he remains within the state. The concurrent existence of these two propositions is quite possible as a fact, but they certainly cannot both result from sound logic or a rule of reasonableness.

The use of the term "matrimonial domicile" in this connection has had an unfortunate tendency. It has frequently been treated as though it of necessity meant a place where the parties had lived together as husband and wife, or as synonymous with common domicile. Its true meaning is rather this: it is that place where one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations. This seems a plain, simple, and just test for the rights involved.

The suggestion has been made that under the rule in the *Haddock* Case the second decree obtained by an eloping wife at her new abode would be binding upon the husband, although "as her husband is not present, and she therefore has the entire control over the evidence, she will be able to convince the court of her own inno-

¹⁹ *Haddock v. Haddock*, 201 U. S. 562, 631 (1906).

²⁰ *Ibid.*

²¹ *Thompson v. Thompson*, 226 U. S. 551 (1913). In this case the guilty, home-staying husband succeeded in evading service of process issued by the court of the innocent wife's new domicile until he had instituted and carried to a successful issue his libel against her at his domicile. It seems that the race of diligence is still on; for her power under such circumstances to "get a different domicile from that of her husband for purposes of divorce is not disputed and is not open to dispute. *Haddock v. Haddock*, 201 U. S. 562, 571, 572." Holmes, J., in *Williamson v. Osenton*, 232 U. S. 619, 625 (1914).

cence and her husband's fault." ²² The question of who deserted, being jurisdictional, is always open to inquiry in any proceeding wherein the decree based upon jurisdiction so obtained is offered in evidence. That issue cannot be foreclosed in an action when only one party is present, save where the other party is subject to the jurisdiction and has defaulted. The jurisdictional question always being open to investigation, when the decree is offered in evidence the inquiry begins: Was the defendant in the former proceeding within the state and duly served with process? If not, were the facts as to the conduct and relations of the parties such as to show that the marital status was at the place where the decree was entered? If it was, the court had jurisdiction over the *res*. If it was not, there was no jurisdiction. The fact that this issue was passed upon *ex parte* in the prior proceeding in no way forecloses the right of the libellee to inquire into it when the decree is subsequently offered against him.

But it is said this makes jurisdiction depend upon the merits of the case, — a proposition which seems to be regarded as a plain absurdity by those who state it. ²³ In most cases it is true that the facts to be litigated will in the main be the same, although there may be exceptions. But assume that it is an unescapable result in every case. What of it? Are jurisdictional questions tabooed because the same facts bear on the merits also? Of what avail to try the merits without jurisdiction? It is putting the cart before the horse to claim that, because the merits have been tried, therefore the jurisdictional questions are foreclosed. Yet the proposition has seemed attractive to not a few.

In most of these cases it is a misnomer to speak of the first hearing as a trial. It is in fact, if not always in law, an *ex parte* attempt to ascertain the truth. At the second hearing, when both parties are present, it is sought to foreclose the matter upon the ground that the libellee theretofore had his day in court. Upon that issue he is, by all the authorities, entitled to be heard. In other proceedings the objection that the issues raised were the same has been

²² 19 HARV. L. REV. 586, 589.

²³ The inquiry in the second case is not to determine whether the merits "have been decided rightly," — Holmes, J., in *Haddock v. Haddock*, 201 U. S. 562, 628 (1906), — but to ascertain whether there was jurisdiction to pass upon the merits. The proceeding being *in rem*, jurisdiction "depends . . . upon the state of the thing." *Rose v. Himely*, 4 Cranch (U. S.) 241, 269 (1808).

overruled. The condemnation of a vessel for illegal fishing within a New Jersey county involved the question whether the acts were done within the county limits. The question was both jurisdictional and of the merits, and its decision was recited in the decree. Yet, when the decree was set up in New York, it was held that the facts were open for trial upon the jurisdictional issue.²⁴ The principle has the approval of later cases.²⁵

Whether, when both parties are present in a court having jurisdiction over them personally, the original adjudication as to jurisdiction over the *res* is conclusive as to them is a matter upon which the authorities have not been at all agreed.²⁶ There seems to be sound reason in the proposition that if they are so present the judgment is final as to them. They have had their day in court. But the authority of the Supreme Court of the United States seems to be against this rule.²⁷ To be sure, the question in that case was not between the parties to the divorce proceeding, but the language used is broad enough to cover all cases.

It would seem that the rule adopted in *Cheever v. Wilson* gives countenance to the one here advocated. If the question is one of jurisdiction *in rem*, it is difficult to see how it is enlarged by jurisdiction over a person interested in the *res*. Yet the questions of fact as to jurisdiction over the *res* must be capable of final settlement at some time and in some way. For example, the final New York judgment in *Atherton v. Atherton* and that in the District of Columbia in *Thompson v. Thompson* must have been conclusive adjudications as to the jurisdictional facts in the Kentucky and Virginia proceedings respectively. Why are they any more conclusive than a like judgment in the original proceeding, when jurisdiction of the person is unquestioned? "If a single hearing is not due process, doubling it will not make it so."²⁸ This is the true

²⁴ *Thompson v. Whitman*, 18 Wall. (U. S.) 457 (1873).

²⁵ *National Exchange Bank v. Wiley*, 195 U. S. 257, 269 (1904).

²⁶ *Andrews v. Andrews*, 176 Mass. 92 (1900), where Chief Justice Holmes reviews the cases. The matter is complicated because public interests are involved and ought not to be cut off by the acts of private individuals. But "As a general rule it would be inconvenient to admit that parties who were divorced as between themselves were not divorced as against others." *Ibid.* Yet this course has sometimes been followed. *In re Ellis' Estate*, 55 Minn. 401 (1893).

²⁷ *Andrews v. Andrews*, 188 U. S. 14 (1903). The conclusion in the state court is sustained, but upon somewhat different reasoning.

²⁸ *Pittsburg, etc. Railway Company v. Backus*, 154 U. S. 421, 427 (1894).

reason why divorces may in some cases be validated by jurisdiction over both parties: the jurisdiction over the *res* is not enlarged, but its existence has been tried and determined.

If the theory of the marital status, or the *res* involved in divorce jurisdiction which was adopted in the Haddock Case were developed to its full extent, a large part of the inconsistencies in the law upon the subject would disappear. The *res* is one and indivisible. Jurisdiction over it exists in one state only. It ordinarily rests in the state where the husband and wife both reside. If they live in different states, it is *primâ facie* in the state of the husband's domicil, since it is his right to fix the family home. But as the right is forfeited by his misconduct, it may be at the wife's domicil. Thus the question of the misconduct of either spouse becomes jurisdictional. It may be subsequently tried out in the state which theretofore assumed jurisdiction to grant a divorce as well as in any other, and the divorce will be valid everywhere or void everywhere, according as the jurisdictional facts are determined in a proceeding in any court having jurisdiction of both parties.

Robert James Peaslee.

MANCHESTER, N. H.

THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

THE federal and most of the state constitutions contain a provision guaranteeing to the people "the right to keep and bear arms." Judge Cooley in his well-known and standard work on *Constitutional Limitations*, published in 1868, wrote of this provision: "How far it may be in the power of the legislature to regulate the right we shall not undertake to say. Happily there neither has been nor, we may hope, is there likely to be much occasion for an examination of that question by the courts." That hope is now fast disappearing. The greater deadliness of small firearms easily carried upon the person, the alarming frequency of homicides and felonious assaults with such arms, the evolution of a distinct class of criminals known as "gunmen" from their ready use of such weapons for criminal purposes, are now pressing home the question of the reason, scope, and limitation of the constitutional guaranty of a right to keep and bear arms,—of the extent of its restraint upon the legislative power and duty to prohibit acts endangering the public peace or the safety of the individual.

The guaranty does not appear to have been of a common-law right, like that of trial by jury. On the contrary, it was as early as 1328 declared by the Statute of Northampton, 2 Edw. III, ch. 3, that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere upon pain," etc. Such conduct was probably regarded as tending to terrify peaceful people and to provoke breaches of the peace. At any rate, it was indictable under the common law. Naturally the Statute of Northampton and the practice under it became the common law of the English colonies in America.¹ Further, a statute of 22 Car. II, ch. 25, § 3, provided that no person who had not lands of the yearly value of £100 other than the son and heir of an esquire or other person of higher degree, should be allowed even to keep a gun. Whatever the purpose of this statute, whether to preserve game or the public peace,

¹ Bishop, *STATUTORY CRIMES*, § 784.

yet read in connection with the earlier statute of Edward III, it shows that a right to keep and bear arms was not regarded as a fundamental right of every Englishman.

On the other hand, from very early times landed proprietors were required to have in readiness, according to their degree and estate, specified arms and equipments and men-at-arms at their own expense for military service when required by the government. These landed proprietors, with their tenants and retainers thus armed, constituted the military forces, the *milites*, the militia of the kingdom. At the time of the restoration of the monarchy in the person of Charles II, no other armed force was recognized as lawful.

That king, however, having seen during his exile in France the autocratic power of a king possessing a standing army independent of the people and under his sole control, began himself to form the nucleus of such an army by organizing a body of soldiers as guards of his court and person, and armed, equipped, and paid out of the royal revenues. His successor, James II, increased this nucleus into a regular army for general military service, greatly to the dissatisfaction of his subjects, Whig and Tory alike. Finally, after the suppression of Monmouth's rebellion, he caused many of his Protestant subjects of militia status to be deprived of their arms on the plea that it was necessary for the preservation of the peace and the security of the government. In the Declaration of Rights proclaimed by the Convention Parliament after the flight of James, these acts were recited as having been on his part an "endeavor to subvert and extirpate the laws and liberties of this kingdom" and as "contrary to law." In the subsequent statutory Bill of Rights based on that Declaration, it was enacted "That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of parliament is against the law." It was also enacted in the next clause "That the subjects which are Protestants may have arms for their defense suitable to their condition, and as allowed by law."

It is quite evident from the foregoing that in the seventeenth century in England the assertion of the right of Protestant subjects to have arms was to preserve "the laws and liberties of the Kingdom" and not at all to enable a subject to violate them.

In the American colonies, with their small revenues and beset

as they were with savage and other enemies, it was deemed necessary that every man of military age and capacity should provide himself with arms and be ready to bear them in defense of himself and his neighbors and the colony at large. Accordingly every man of military age and capacity was enrolled for military service and was required by law to provide and keep at his own expense specified arms and equipments for such service. The colonies had no other means of defense against foreign or domestic enemies, as they maintained no standing armies whatever. The only regular troops in the colonies were those sent out from England and under the direct command of royal instead of colonial officers. The presence of these troops in times of peace was very distasteful to the people of the colonies. One of the grievances recited in the Declaration of Independence was that the king had kept among the people of the colonies in times of peace standing armies without the consent of their legislatures.

Through their long controversies with the king and Parliament as to their respective rights, the people of the colonies had become familiar with English political history and the various charters of English liberties, including the Bill of Rights of the time of William and Mary. In this last the clauses relating to standing armies and the right of the subjects to have arms for their defense were closely related. This right and a reliance on a citizen soldiery or militia were coupled together in their thought and experience, and we find that connection more or less clearly expressed in the American Bills of Rights.

In the federal Bill of Rights the language is: "A well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed." The fear that standing armies may be dangerous to "the laws and liberties" of the people is expressed in the constitutional provision that no appropriation of money for raising and supporting armies shall be for more than two years, and that there should be no quartering of soldiers on the people in time of peace.

In the Massachusetts Bill of Rights the language is: "The people have a right to keep and bear arms for the common defense, and as in times of peace armies are dangerous to liberty, they ought not to be maintained without consent of the legislature." In that of Connecticut: "Every citizen has a right to bear arms in defense

of himself and the state." In that of Pennsylvania: "The right of the citizens to bear arms in defense of themselves and the state shall not be questioned." In that of South Carolina: "The people have a right to keep and bear arms for the common defense." In that of Virginia: "A well-regulated militia composed of the body of the people is the proper, natural, and safe defense of a free state." In some of the states the language is condensed into "The right of the people to keep and bear arms shall not be infringed."

But, however concise the language of the provision, it should be construed in connection with the well-known objection to standing armies and the general belief in the need and sufficiency of a well-regulated militia for the defense of the people and the state. Thus construed it is a provision for preserving to the people the right and power of organized military defense of themselves and the state and of organized military resistance to unlawful acts of the government itself, as in the case of the American Revolution. To quote Bishop, Statutory Crimes, § 793: "In reason the keeping and bearing of arms has reference to war and possibly also to insurrections where the forms of war are so far as possible observed." The phrase itself, "to bear arms," indicates as much. The single individual or the unorganized crowd, in carrying weapons, is not spoken of or thought of as "bearing arms." The use of the phrase suggests ideas of a military nature.

From the foregoing premises I think there are deducible several propositions as to the power of the legislature to restrict and even forbid carrying weapons by individuals, however powerless it may be as to the simple possessing or keeping weapons.

The constitutional guaranty of a right to bear arms does not include weapons not usual or suitable for use in organized civilized warfare, such as dirks, bowie knives, sling shot, brass knuckles, etc., and the carrying of such weapons may be prohibited. Only persons of military capacity to bear arms in military organizations are within the spirit of the guaranty. Women, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits, may be prohibited from carrying weapons. All persons may be forbidden to carry concealed weapons. Military arms may not be carried in all places even by persons competent to serve in the militia. They may be excluded from courts of justice, polling places,

school houses, churches, religious and political meetings, legislative halls and the like. So the carrying of even military arms in street parades and other public demonstrations may be forbidden.² In *Presser v. Illinois*, 116 U. S. 264, in speaking of a statute of Illinois, the court said:

"We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms."

Lastly, I submit that the right guaranteed is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against the common enemy, foreign or domestic. The guaranty is to insure the safety of the people, their "laws and liberties," against assaults from any source or quarter, but not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others. Granting that the individual may carry weapons when necessary for his personal defense or that of his family or property, it is submitted that he may be forbidden to carry dangerous weapons except in cases where he has reason to believe and does believe that it is necessary for such defense. In fine, I venture the opinion that, without violence to the constitutional guaranty of the right of the people to bear arms, the carrying of weapons by individuals may be regulated, restricted, and even prohibited according as conditions and circumstances may make it necessary for the protection of the people.

Lucilius A. Emery.

MAINE.

² *Commonwealth v. Murphy*, 166 Mass. 171, 44 N. E. 138 (1896).

WAYS AND WATERS IN MASSACHUSETTS

WHEN ways are laid out, relocated, or repaired, problems frequently arise with respect to waters. The surface water which collects on the way must be taken care of. It may be necessary to cross a stream. A stream may rise even within the limits of the way. Surface water may flow on to the way from adjoining estates. The physical problems with respect to these waters are for the engineer. But they raise legal problems as to the relative rights of the public and of abutters. The purpose of this article is to consider the rules of law which govern their solution.

Ways are of different sorts, such as highways, town ways, and private ways. But for the purposes of this article the distinction between these kinds of ways need not be considered. In this article the highway will be treated as the typical way unless something different is expressly stated. The problem, then, is as to the legal rules which govern the relation between highways and waters.

In Massachusetts the fee of the highway is generally in the abutter.¹ But the fee is subject to the easement of passage incident to the highway. Moreover, the highway easement is of far-reaching character. It is not confined to a simple right on the part of the public to pass and repass on foot or in vehicles. The public as an incident of the easement may place structures in the way. Thus, poles,² pipes,³ and wires² impose no additional servitude. Sewers may be built beneath the highway without "taking" any additional property.⁴ Even a subway gives the owner of the fee no right to complain.⁵ Horse⁶ and trolley⁷ roads are likewise

¹ *Boston v. Richardson*, 13 Allen 146 (1866).

² *Pierce v. Drew*, 136 Mass. 75 (1883); *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492 (1908).

³ *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. 925 (1897).

⁴ *Lincoln v. Commonwealth*, 164 Mass. 1, 41 N. E. 112 (1895); *Lawrence v. Nahant*, 136 Mass. 477 (1884).

⁵ *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327 (1904).

⁶ *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515 (1878); *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363, 59 N. E. 1025 (1901).

⁷ *Howe v. West End Street Ry. Co.*, 167 Mass. 46, 44 N. E. 386 (1896); *Eustis v. Milton Street Ry. Co.*, 183 Mass. 586, 67 N. E. 663 (1903).

within the easement. But the right to maintain these incidentals of the highway easement continues only so long as the highway itself exists, and ceases if it be discontinued.⁸ The constant unfolding of the highway easement so as to permit new uses by the public has left little save a name to the ownership of the fee by the abutter. So long as the highway exists as such the public has a power to act, which is substantially equal to the right of the public in those communities which own the fee of their streets.⁹

The right of the public is confined to the limits of the highway location. Thus where the city, in bringing a street to the established grade, caused the embankment which supported the street to encroach upon the plaintiff's land, the plaintiff may maintain an action of tort therefor and is not liable in tort for digging away the embankment up to his line.¹⁰ Again, an abutter may destroy a gutter which has been built upon his land, even though the water flowing therein is turned back and injures the highway.¹¹ In neither case was the plaintiff's land "taken" for this purpose. Consequently the act of the public authorities was an unwarrantable encroachment upon land beyond the limits of the highway.

Changes in the highway surface made under public authority within the limits of the highway stand upon a different footing. At common law such changes gave no right of action, if they were made with reasonable care. Thus tort will not lie for damage to an abutter, caused by repairs made in a proper manner in the highway.¹² Indeed the public authorities may change the grade of the highway without incurring common-law liability to abutters, provided the change is made in a reasonable manner.¹³ On the other hand, if the work be done negligently or improperly, tort will lie.¹⁴ It has been held, however, that if repairs otherwise proper

⁸ *New England Tel., etc. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835 (1903); *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566, 69 N. E. 346 (1904).

⁹ See *Commonwealth v. Morrison*, 197 Mass. 199, 203, 83 N. E. 415, 416 (1908).

¹⁰ *Mayo v. Springfield*, 136 Mass. 10 (1883).

¹¹ *Franklin v. Fisk*, 13 Allen 211 (1866).

¹² *Elder v. Bemis*, 2 Metc. 599 (1841); *Benjamin v. Wheeler*, 15 Gray 486 (1860); *Benjamin v. Wheeler*, 8 Gray 409 (1857).

¹³ *Callender v. Marsh*, 1 Pick. 418 (1823); *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461 (1899); *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589 (1900).

¹⁴ *Perry v. Worcester*, 6 Gray 544 (1856); *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703 (1886); *Brewer v. Boston, etc., R. R. Co.*, 113 Mass. 52 (1873).

in themselves be made in a proper manner, but with malicious motive, no action lies at common law.¹⁵ At common law, then, the public authorities have a very wide discretion with respect to changes of surface within the highway location. Statutes, as will be later shown, have given damages with respect to some matters for which there was no liability at common law. But the right of the public authorities at common law has far-reaching effects upon the relation of the highway to waters of various kinds.

For the purposes of this article waters may be divided into two main groups, — watercourses and surface waters. A watercourse flows with some regularity between banks more or less defined.¹⁶ Thus, in *Ashley v. Wolcott*,¹⁷ Bigelow, J., said (p. 195):

"There is a broad distinction between a regular flowing stream and occasional and temporary outbursts of water, which in times of freshets fill up low and marshy places, and run over and inundate adjoining lands. To maintain a right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel with banks or sides. It need not be shown to flow continually; it may even be dry at times, but it must have a well-defined and substantial existence."

Yet some latitude is allowed with respect to definiteness of banks. Thus, where water flowed between banks with some regularity, then spread with no definite banks for about twelve rods, and then flowed between definite banks again, it was held that it was still a watercourse even at the point where the banks were indefinite.¹⁸ A watercourse, then, is determined by two factors, — definiteness of banks and regularity of flow. Both must be present to a substantial extent. But it seems that some lack in either factor may be compensated by an additional amount of the other factor.

Surface water is water which has not yet become a watercourse.

¹⁵ *Benjamin v. Wheeler*, 8 Gray 409 (1857); *Benjamin v. Wheeler*, 15 Gray 486 (1860).

¹⁶ *Luther v. Winnisimmet Co.*, 9 Cush. 171 (1851); *Ashley v. Wolcott*, 11 Cush. 192 (1853); *Dickinson v. Worcester*, 7 Allen 19 (1863); *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703 (1886); *Macomber v. Godfrey*, 108 Mass. 219 (1871). See also *Stimson v. Brookline*, 197 Mass. 568, 83 N. E. 893 (1908) (ancient ditch treated as watercourse).

¹⁷ 11 Cush. 192 (1853).

¹⁸ *Macomber v. Godfrey*, 108 Mass. 219 (1871).

Want of definiteness is the earmark of surface water. At times it may be considerable in extent.¹⁹ It may even tend to flow in a definite direction.²⁰ But it is irregular in flow and has no definite, natural channel. It may become a watercourse, however, at some definite point. Thus, in *Nealley v. Bradford*,²¹ the master found that what was mere surface water beyond the limits of the highway became a natural watercourse within the limits of the highway. In a word, it is want of regularity and definiteness which distinguishes flow of surface water from a watercourse.

A natural watercourse has been described as a natural easement appurtenant to the soil. Each riparian proprietor has a right that it flow to him substantially as it was wont to flow. The proprietor above may not divert it from the proprietor below; the proprietor below may not back it up upon the proprietor above. It is true that each riparian proprietor is entitled to use the water to some extent upon his tract. But for the purposes of this article, the precise nature and extent of this right to use need not be considered. Here it is sufficient to say that each riparian proprietor is entitled to the stream *ut currere solebat*.²²

The right of the riparian proprietor to the stream as it was wont to flow does not yield to the highway easement. The public authorities have no inherent right to stop natural watercourses to the damage of riparian owners. Of course the rights of riparian owners are subject to the exercise of eminent domain,²³ just as other property rights are subject thereto. But even when a way is laid out across a natural watercourse, by an authority possessing the power of eminent domain, the rights of riparian owners must be considered. Thus, where a corporation was authorized to lay out a road over a natural watercourse, it was intimated that pro-

¹⁹ *Dickinson v. Worcester*, 7 Allen 19 (1863); *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174, 5 N. E. 142 (1886).

²⁰ *Parks v. Newburyport*, 10 Gray 28 (1857); *Dickinson v. Worcester*, 7 Allen 19 (1863); *Gannon v. Hargadon*, 10 Allen 106 (1865); *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174, 5 N. E. 142 (1886); *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230 (1889); *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327 (1890).

²¹ 145 Mass. 561, 14 N. E. 652 (1888).

²² *Merrifield v. Lombard*, 13 Allen 16 (1866).

²³ *Boston Belting Co. v. Boston*, 152 Mass. 307, 25 N. E. 613 (1890); *Boston Belting Co. v. Boston*, 183 Mass. 254, 67 N. E. 428 (1903); *Rowe v. Granite Bridge Corp.*, 21 Pick. 344 (1838); *Moulton v. Newburyport Water Co.*, 137 Mass. 163 (1884).

vision must be made for the watercourse or else damages paid.²⁴ And it has been held that a town is liable for permitting a third party to close the openings in a highway bridge built over a tidal stream, whereby the water was set back upon plaintiff's land.²⁵

But while the bridge must be adequate to provide for conditions naturally to be anticipated, the city is not liable in tort because the bridge was insufficient for an extraordinary freshet.²⁶ Yet, where the bridge was negligently built in a manner insufficient to take care of the stream under ordinary conditions, tort will lie, even though the bridge was built under proper authority, since such authority must be reasonably and skillfully exercised.²⁷ On the other hand, the city is not liable because a bridge originally sufficient becomes insufficient to take care of the natural flow of the stream because of the unauthorized acts of third parties.²⁸ In bridging natural watercourses, then, the authorities are liable in tort if the bridge be insufficient for conditions naturally to be anticipated, but are not liable for damage due to extraordinary freshets or to the unauthorized acts of third parties.

Culverts are subject to very similar rules. The culvert need only be adequate for the flow of the stream in its natural state.³⁰ Thus, a city is not liable because a culvert, originally sufficient, becomes insufficient by reason of subsequent alterations in the stream made by the county commissioners.³⁰ On the other hand, the city must construct and maintain a culvert sufficient for the natural flow of the stream.³¹ Thus, tort will lie for failure by the city to use reasonable care to keep the culvert clear, even though the plaintiff owns the land on both sides of the street and the fee of the street.³² The rule is thus declared by Bigelow, J., in *Parker v. Lowell* (p. 357):³³

²⁴ *Rowe v. Granite Bridge Corp.*, 21 Pick. 344 (1838).

²⁵ *Lawrence v. Fairhaven*, 5 Gray 110 (1855). See also *Stimson v. Brookline*, 197 Mass. 568, 83 N. E. 893 (1908).

²⁶ *Sprague v. Worcester*, 13 Gray 193 (1859).

²⁷ *Perry v. Worcester*, 6 Gray 544 (1856).

²⁸ *Wheeler v. Worcester*, 10 Allen 591 (1865).

³⁰ *Cochrane v. Malden*, 152 Mass. 365, 25 N. E. 620 (1890). See also R. L., c. 48, § 57, and STAT. 1906, c. 463, § 101.

³¹ *Parker v. Lowell*, 11 Gray 353 (1858); *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703 (1886).

³² *Parker v. Lowell*, 11 Gray 353 (1858).

³³ 11 Gray 353. The language is evidently borrowed from Chief Justice Shaw in

"It is now the well settled rule of law in this commonwealth that in all cases where a highway, turnpike, bridge, town way or other way is laid across a natural stream of water, it is the duty of those who use such franchise or privilege to make provision by open bridges, culverts or other means for the free current of the water, so that it shall not be obstructed and pent up to flow back on lands belonging to the riparian proprietors. And it is their duty not only to make such bridge, culvert or passage for water, but to keep it in such condition that it shall not obstruct the stream."

Yet natural watercourses and riparian rights may be made to yield to the public interest. Thus, equity will not enjoin a bridge corporation which possesses the right of eminent domain from diverting a natural watercourse into an artificial canal if such a change be reasonably necessary.³⁴ The riparian owner is left to his remedy in damages under the statute for any acts lawfully done in the exercise of the powers conferred.³⁵ But where the damage is inflicted unnecessarily³⁶ or negligently³⁷ in the exercise of such powers, tort will lie. It has, however, been held that, where the acts were beyond the scope of the powers conferred and not merely an improper exercise of those powers, no action lay against the town,³⁸ apparently upon the theory that the acts were the acts of the officers, individually, rather than of the public authority. Authority may be given, therefore, to alter natural watercourses

Lawrence v. Fairhaven, 5 Gray 110, 116, (1855). The same rule has been applied to railroads. *Estabrooks v. Peterborough, etc., R. R. Co.*, 12 Cush. 224 (1853); *Blood v. Nashua, etc., R. R. Co.*, 2 Gray 137 (1854); *Mellen v. Western Railroad Corp.*, 4 Gray 301 (1855).

³⁴ *Rowe v. Granite Bridge Corp.*, 21 Pick. 344 (1838).

³⁵ *Rowe v. Granite Bridge Corp.*, 21 Pick. 344 (1838) (*semble*); *Hull v. Westfield*, 133 Mass. 433 (1882); *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320 (1889); 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903); *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220 (1900).

³⁶ *Curtis v. Eastern R. R. Co.*, 14 Allen 55 (1867), 98 Mass. 428 (1868).

³⁷ *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320 (1889); 183 Mass. 254, 67 N. E. 428 (1903); *Lawrence v. Fairhaven*, 5 Gray 110 (1855); *Perry v. Worcester*, 6 Gray 544 (1856); *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694 (1885). See also *Estabrooks v. Peterborough, etc. R. R. Co.*, 12 Cush. 224 (1853); *Mellen v. Western R. R. Corp.*, 4 Gray 301 (1855). But if the damage be caused in the exercise of the police power by a city acting in a governmental capacity, no action lies. *Harrington v. Worcester*, 186 Mass. 594, 72 N. E. 326 (1904).

³⁸ *Anthony v. Adams*, 1 Metc. 284 (1840); *Tyler v. Revere*, 183 Mass. 98, 66 N. E. 597 (1903).

for public purposes³⁹ with liability for damages under the statute for acts lawfully done in the exercise of such authority and a further liability in tort for damage unnecessarily or negligently caused by misuse of such powers.

An upper riparian proprietor has no right to pollute the waters of a natural watercourse so as to render them unfit for lawful riparian uses by a lower riparian proprietor.⁴⁰ But in *Jackman v. Arlington Mills*⁴⁰ it was held that he may collect water into a channel and discharge it into a natural watercourse if he does not unduly increase the stream or pollute it. Yet, if he thereby creates a nuisance as to the lower proprietor, tort for nuisance will lie.⁴¹ The lower proprietor may also maintain a bill in equity to prevent invasion of his riparian right,⁴² though equity may decline to interfere if no material damage is done and no prescriptive right can be gained.⁴³ A private riparian owner, then, is not permitted to pollute a natural watercourse to any material extent.

The rights of the public are harder to determine because they are complicated by questions of procedure. The legislature may authorize the taking of or injury to riparian rights with corresponding rights of compensation under the statute.⁴⁴ In such a case the acts authorized by the statute cease to be wrongful, and neither a bill in equity⁴⁵ nor action of tort⁴⁶ will lie therefor

³⁹ *Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339 (1899), and n. 23.

⁴⁰ *Harris v. Mackintosh*, 133 Mass. 228 (1882); *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N. E. 466 (1907); *Merrifield v. Lombard*, 13 Allen 16 (1866); *McNamara v. Taft*, 196 Mass. 597, 83 N. E. 310 (1907); *Dwight Printing Co. v. Boston*, 122 Mass. 583 (1877); *Jackman v. Arlington Mills*, 137 Mass. 277 (1884).

⁴¹ *McGenness v. Adriatic Mills*, 116 Mass. 177 (1874).

⁴² *Harris v. Mackintosh*, 133 Mass. 228 (1882); *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N. E. 466 (1907); *Merrifield v. Lombard*, 13 Allen 16 (1866); *McNamara v. Taft*, 196 Mass. 597, 83 N. E. 310 (1907).

⁴³ *Brookline v. Mackintosh*, 133 Mass. 215 (1882).

⁴⁴ *Washburn & Moen Co. v. Worcester*, 116 Mass. 458 (1875); *Rowe v. Granite Bridge Corp.*, 21 Pick. 344 (1838); *Moulton v. Newburyport Water Co.*, 137 Mass. 163 (1884); *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320 (1889); 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903).

⁴⁵ *Rowe v. Granite Bridge Corp.*, 21 Pick. 344 (1838); *Washburn & Moen Co. v. Worcester*, 116 Mass. 458 (1875).

⁴⁶ *Perry v. Worcester*, 6 Gray 544, 547 (1856) (*semble*); *Flagg v. Worcester*, 13 Gray 601 (1859); *Emery v. Lowell*, 104 Mass. 13, 16 (1870); *Hull v. Westfield*, 113 Mass. 433 (1882); *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320 (1889); *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995 (1891); *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220 (1900).

so long as damage is not negligently caused thereby. Moreover, this is true even though the acts, if unauthorized by statute, would be tortious.⁴⁷ The statute in effect takes away the remedy at common law by action of tort and substitutes therefor the statutory remedy.⁴⁸ But this renders the statutory remedy exclusive. Consequently the failure of the plaintiff to maintain his action of tort is no indication at all that a common-law right has not been invaded. Such an action may fail either because the injury to the plaintiff is *damnum absque injuria* or because he has mistaken his remedy.

On the other hand, recovery by petition under the statute does not necessarily indicate invasion of a common-law right. The statute may give recovery for injury even where no common-law right is invaded. Thus, the building of a subway in the highway is not an invasion of the common-law right of the abutter.⁴⁹ Yet the subway statute has been held to give damages for an act which would impose no liability at common law.⁵⁰ A similar liberal construction has been placed upon the grade-crossing act,⁵¹ upon the highway statute,⁵² and upon the act which provided for improving Stony Brook,⁵³ to cite merely two or three examples. Of course the question must depend on the construction of the particular statute involved. But there is a tendency on the part of the court to construe such statutes as *in pari materia* one with the other, upon the ground that they are part of a general scheme of legislation.⁵⁴ Hence success under the statute does not indicate the existence of a common-law right any more than failure in tort

⁴⁷ *Hull v. Westfield*, 133 Mass. 433 (1882); *Washburn & Moen Co. v. Worcester*, 116 Mass. 458 (1875).

⁴⁸ *Perry v. Worcester*, 6 Gray 544, 547 (1856) (*semble*); *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320 (1889); *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220 (1900). But *cf.* *Westcott v. Boston*, 186 Mass. 540, 72 N. E. 89 (1905).

⁴⁹ *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327 (1904).

⁵⁰ *Fifty Associates v. Boston*, 201 Mass. 585, 88 N. E. 427 (1909).

⁵¹ *Hyde v. Fall River*, 189 Mass. 439, 75 N. E. 953 (1905), overruling *Rand v. Boston*, 164 Mass. 354, 41 N. E. 484 (1895).

⁵² *Marsden v. Cambridge*, 114 Mass. 490 (1874); *Woodbury v. Beverly*, 153 Mass. 245, 26 N. E. 851 (1891).

⁵³ *Boston Belting Co. v. Boston*, 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903).

⁵⁴ *Hyde v. Fall River*, 189 Mass. 439, 75 N. E. 953 (1905); *Fifty Associates v. Boston*, 201 Mass. 585, 88 N. E. 427 (1909).

indicates the absence of a common-law right. All that can be said is that in a given case a particular method of procedure has succeeded or failed.

It now remains to consider the cases somewhat in detail. It has been held that tort would not lie for obstructing a watercourse by deposits from drains which carried off the wash from the streets where the amount of water cast into the stream was not greater than the natural surface drainage would have been.⁵⁵ The court, however, intimated that, in so far as the damage was caused by wash from the streets, the remedy was under the statute.⁵⁵ Again, it was held that tort would not lie for opening a surface-water drain within the limits of the highway into a culvert at a point where the culvert crossed the highway, and thereby causing the culvert to overflow, the remedy, if any, being under the statute.⁵⁶ But if large quantities of water are collected from various streets and turned into a natural watercourse, so that it overflows and deposits filth on the land of a lower riparian owner in such quantities as to create a nuisance as to him, it is said that tort will lie.⁵⁷

But where a lower riparian owner was inconvenienced by pollution of a stream due to entering a city drain therein, it was held that there could be no recovery in tort unless the drain was improperly constructed or maintained.⁵⁸ It has also been held that equity will not enjoin a city, at the instance of a riparian proprietor, from turning a reasonable amount of surface drainage into a watercourse, even though some pollution was caused thereby, the plaintiff being left to his remedy under the statute.⁵⁹ The cases above considered, it should be noted, dealt only with the disposal of *surface* water. Here it seems to be a question of degree.⁶⁰ A moderate discharge,⁶⁰ or even one which causes some overflow,⁶¹ will not support either an action at law⁶¹ or a bill in equity;⁶⁰

⁵⁵ *Wheeler v. Worcester*, 10 Allen 591 (1865).

⁵⁶ *Flagg v. Worcester*, 13 Gray 601 (1859); *Emery v. Lowell*, 104 Mass. 13 (1870); *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220 (1900). The statute is the statute which deals with the repair of highways, R. S., c. 25, § 6; G. S., c. 44, § 19; P. S., c. 52, § 15; R. L., c. 51, § 15.

⁵⁷ *Manning v. Lowell*, 130 Mass. 21, 25 (1880).

⁵⁸ *Merrifield v. Worcester*, 110 Mass. 216 (1872).

⁵⁹ *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995 (1891).

⁶⁰ *Ibid.*

⁶¹ See n. 56.

but an immoderate discharge, gathered from a considerable area and sufficient to cause a nuisance,⁶² will support an action of tort.

A distinction is made, however, between drainage of *surface* water and *sewers*. Thus, tort will lie for ending a common sewer in the tail race of the plaintiff's mill, even though the sewer enter the tail race where it passed under the highway in a culvert.⁶³ It is true that, where a statute⁶⁴ authorizes the use of a brook as a sewer and gives damages, equity will not restrain the acts authorized by the statute⁶⁵ unless they are being performed in a negligent manner,⁶⁶ but will leave the parties to the statutory remedy. On the other hand, tort will lie where a city builds a sewer across the plaintiff's land and ends it in the plaintiff's canal, even though the canal was built upon the site of a natural watercourse.⁶⁷ And where the city casts sewage into a watercourse⁶⁸ or canal⁶⁹ in such quantities as to create a nuisance as to the plaintiff, relief may be had both at law⁷⁰ and in equity.⁷¹ Logically, perhaps, it is difficult to distinguish between sewers and surface drainage. Yet there is a marked difference in degree. Sewage easily creates a nuisance, while surface water is less apt to do so. Moreover, relief has been given where the quantity and quality of the surface water created a nuisance. Undoubtedly the difference in degree explains the difference in the rule of law.

Artificial streams are entitled to less protection than natural watercourses because of their different origin. In the first place it is wrongful to collect water into an artificial stream or channel

⁶² *Manning v. Lowell*, 130 Mass. 21, 25 (1880).

⁶³ *Nevins v. Fitchburg*, 174 Mass. 545, 55 N. E. 321 (1899).

⁶⁴ STAT. 1867, c. 106. This statute has been frequently construed. See *Harrington v. Worcester*, 186 Mass. 594 (1905), which construes a later enactment.

⁶⁵ *Washburn & Moen Co. v. Worcester*, 116 Mass. 458 (1875).

⁶⁶ *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694 (1885).

⁶⁷ *Proprietors of Locks and Canals v. Lowell*, 7 Gray 223 (1856).

⁶⁸ *Woodward v. Worcester*, 121 Mass. 245 (1876); *Whitten v. Haverhill*, 204 Mass. 95, 90 N. E. 409 (1910); *Haskell v. New Bedford*, 108 Mass. 208 (1871); *Brayton v. Fall River*, 113 Mass. 218 (1873).

⁶⁹ *Boston Rolling Mills v. Cambridge*, 117 Mass. 396 (1875). Similarly, as to a mill pond, *Middlesex Co. v. Lowell*, 149 Mass. 509, 21 N. E. 872 (1889).

⁷⁰ *Haskell v. New Bedford*, 108 Mass. 208 (1871); *Whitten v. Haverhill*, 204 Mass. 95, 90 N. E. 409 (1910); *Brayton v. Fall River*, 113 Mass. 218 (1873).

⁷¹ *Woodward v. Worcester*, 121 Mass. 245 (1876), *Boston Rolling Mills v. Cambridge*, 117 Mass. 396 (1875); *Haskell v. New Bedford*, 108 Mass. 208 (1871).

and cast it upon adjoining property.⁷² Indeed the wrong does not depend upon the size of the stream. Thus, it has been held that it is improper to cast water artificially upon a neighbor's land, either in a stream or drop by drop.⁷³ Hence an easement to cast water in this manner may be acquired by prescription,⁷⁴ even though no easement is acquired by the flow of mere surface water, however long continued.⁷⁵ Indeed, to collect water into a stream and turn it upon the highway has been held to be a public nuisance,⁷⁶ for which, it is said, no easement can be acquired.⁷⁷ An artificial stream, then, is almost the antithesis of a natural watercourse. A riparian owner has a right to the flow of a natural watercourse in its natural state, unless that right is limited by grant or prescription, while the right to maintain an artificial stream must be acquired by grant or prescription.

The difference between natural watercourses and artificial streams produces a marked difference in rights. Bridges or culverts over natural watercourses must be maintained by the public authorities,⁷⁸ while, if an artificial watercourse be lawfully carried under the highway, the liability to repair the bridge is on the party who maintains the watercourse.⁷⁹ And where a culvert is placed in the highway to protect it from an artificial mill pond, the public authorities may close the culvert at their pleasure, if no prescriptive right thereto has been gained.⁸⁰ Again, the public authorities

⁷² *Curtis v. Eastern R. R. Co.*, 14 Allen 55 (1867); *Curtis v. Eastern R. R. Co.*, 98 Mass. 428 (1868); *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070 (1890). See also *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178 (1899), and n. 90.

⁷³ *Martin v. Simpson*, 6 Allen 102 (1863).

⁷⁴ *White v. Chapin*, 12 Allen 516 (1866); *Rathke v. Gardner*, 134 Mass. 14 (1883). See also *Stimson v. Brookline*, 197 Mass. 568, 83 N. E. 893 (1908); *Dickinson v. Worcester*, 7 Allen 19, 22 (1863) (*semble*).

⁷⁵ *Parks v. Newburyport*, 10 Gray 28 (1857); *Rathke v. Gardner*, 134 Mass. 14 (1883).

⁷⁶ *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382 (1901); *Cavanagh v. Block*, 192 Mass. 63, 77 N. E. 1027 (1906) (private way); *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503 (1907); *Field v. Gowdy*, 199 Mass. 568, 85 N. E. 884 (1908); *Drake v. Taylor*, 203 Mass. 528, 89 N. E. 1035 (1909).

⁷⁷ *Leahan v. Cochran*, 178 Mass. 566, 570, 60 N. E. 382 (1901) (*semble*); *Holyoke v. Hadley Co.*, 174 Mass. 424, 54 N. E. 889 (1899); *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503 (1907).

⁷⁸ See n. 24-33 inclusive.

⁷⁹ *Perley v. Chandler*, 6 Mass. 453 (1810); *Lowell v. Proprietors of Locks and Canals*, 104 Mass. 18 (1870).

⁸⁰ *Drew v. Westfield*, 124 Mass. 461 (1878). But see *Stimson v. Brookline*, 197 Mass. 568, 83 N. E. 893 (1908).

are not bound to clear a culvert under a highway which carries surface water and under drainage from plaintiff's meadow.⁸¹ Artificial streams, then, may be actually wrongful, and where lawful must be cared for by those who maintain them.

Surface waters have already been distinguished from natural watercourses.⁸² The difference is really one of degree. Surface water lacks regularity of flow or definiteness of channel, though it may tend to flow in a certain definite direction and be considerable in amount. Any change of surface generally affects the flow of surface water. Raising the grade may exclude surface water which would otherwise flow on to the premises. Alterations of surface may change the direction in which surface water tends to flow from the place in question. But changes of grade or surface are incidental to control of the surface. If an owner could not make improvements without liability for changes in the behavior of surface water, he would be deprived of effective use of his property. The natural rights of the landowner and the difference in degree between surface water and natural watercourses have led to radical differences in the rules of law applicable to each class. The attitude of law and landowner alike is well illustrated by the following quotation from *Beals v. Brookline* (p. 20):⁸³

"In the language of the older books surface water is regarded very largely by the law 'as a common enemy which every proprietor may fight or get rid of as best he may.' . . ."

A private owner has large powers and small liabilities with respect to surface water. Thus, no action lies for failure to prevent surface water from flowing on to the land of an adjoining proprietor.⁸⁴ But the adjoining proprietor may prevent such flow, even though the water gathers in injurious quantities on the land of the other owner.⁸⁵ He may prevent surface drainage from a highway, even though the highway is thereby injured.⁸⁶ Indeed

⁸¹ *Dickinson v. Worcester*, 7 Allen 19 (1863).

⁸² *Ante*, n. 16-21.

⁸³ 174 Mass. 1, 54 N. E. 339 (1899).

⁸⁴ *Morrill v. Hurley*, 120 Mass. 99 (1876).

⁸⁵ *Gannon v. Hargadon*, 10 Allen 106 (1865); *Franklin v. Fisk*, 13 Allen 211 (1866); *Bates v. Smith*, 100 Mass. 181 (1868); *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174, 5 N. E. 142 (1886).

⁸⁶ *Franklin v. Fisk*, 13 Allen 211 (1866).

no prescriptive right to mere surface drainage can be gained.⁸⁷ Again, a landowner may change the surface of his land so that surface water which has flowed thereon is turned off on to the land of another.⁸⁸ Nor is he liable because ordinary cultivation of his land causes unusual quantities of soil to wash down into a neighboring mill pond.⁸⁹ So long as surface water retains its indefinite character, any landowner may exclude it from his premises or turn it on to the premises of another without liability.

But a landowner may not gather surface water into an artificial channel and cast it upon the premises of another.⁹⁰ Thus, it is wrong to cast water from a roof against the wall of a neighboring building.⁹¹ And tort will lie where a railroad unnecessarily conducts water in an artificial channel and casts it upon neighboring land, even though the water is first made to percolate through the railroad embankment.⁹² Indeed, to gather water into a stream and cast it upon the highway amounts to a public nuisance,⁹³ for which no prescriptive right can be gained,⁹⁴ although one owner may acquire a right by prescription to cast water in a stream on the premises of another.⁹⁵ The rule is really the converse of the rule with respect to natural watercourses. A landowner has no inherent right to prevent the ordinary flow of a natural stream to or from his property. Neither may he create an artificial stream and turn it upon the land of another.

The common-law right of the public authorities with respect to surface water in the highway is at least as great as that of the individual owner with respect to surface water on his premises.

⁸⁷ *Parks v. Newburyport*, 10 Gray 28 (1857).

⁸⁸ *Gannon v. Hargadon*, 10 Allen 106 (1865).

⁸⁹ *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230 (1889).

⁹⁰ *Martin v. Simpson*, 6 Allen 102 (1863); *Curtis v. Eastern R. R. Co.*, 14 Allen 55 (1867); 98 Mass. 428 (1868); *Rathke v. Gardner*, 134 Mass. 14, 16 (1883) (*semble*); *Bates v. Westborough*, 151 Mass. 174, 181, 23 N. E. 1070, 1071 (1890); *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178 (1899); *Daley v. Watertown*, 192 Mass. 116, 78 N. E. 143 (1906); *Westcott v. Boston*, 186 Mass. 540, 72 N. E. 89 (1905). See also *Smith v. Gloucester*, 201 Mass. 329, 333, 87 N. E. 626, 628 (1909).

⁹¹ *Martin v. Simpson*, 6 Allen 102 (1863).

⁹² *Curtis v. Eastern R. R. Co.*, 14 Allen 55 (1867); 98 Mass. 428 (1868). The court intimated that, if such discharge were necessary, the railroad should take and pay for the right by eminent domain.

⁹³ See *ante*, n. 76.

⁹⁴ See *ante*, n. 77.

⁹⁵ *White v. Chapin*, 12 Allen 516 (1866); *Rathke v. Gardner*, 134 Mass. 14 (1883).

Thus, the public authorities may prevent surface water from flowing from the premises of an abutter on to the highway.⁹⁶ They may also turn surface water on to the premises of an abutter without liability in tort.⁹⁷ Even if the water be gathered into gutters or channels, there is no tort liability, if these overflow upon the premises of an abutter,⁹⁸ so long as the water is not cast thereon in a definite channel. Indeed, it has been held that tort will not lie where surface water is drained into a cesspool within the limits of the highway and thence percolates or overflows into the cellar of an abutter.⁹⁹ It is not quite clear, however, whether these cases rest upon the ground that no common-law right of the abutter is infringed or upon the ground that there is a remedy by statute.¹⁰⁰ The statute makes liberal provision for damages due to laying out¹⁰¹ and repairing¹⁰² ways, and there is a special enactment with regard to the wash from ways.¹⁰³ Several of the cases which deny a remedy in tort intimate that there may be a remedy under the statute.¹⁰⁴ It may be that these cases go no farther than to hold that the plaintiff has mistaken his remedy. But even in that aspect they do not affirmatively indicate that the common-law right of the public with respect to surface water in the streets is any less than that of the abutter, while there are intimations that no common-law right of the abutter is infringed.¹⁰⁵

On the other hand, the public authorities may not gather the surface water on the highway into a channel and turn the channel

⁹⁶ *Keith v. Brockton*, 136 Mass. 119 (1883); *Dickinson v. Worcester*, 7 Allen 19 (1863).

⁹⁷ *Turner v. Dartmouth*, 13 Allen 291 (1866); *Flagg v. Worcester*, 13 Gray 601. (1859).

⁹⁸ *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327 (1890); *Hewett v. Canton*, 182 Mass. 220, 65 N. E. 42 (1902).

⁹⁹ *Kennison v. Beverly*, 146 Mass. 467, 16 N. E. 278 (1888); *Barry v. Lowell*, 8 Allen 127 (1864).

¹⁰⁰ See *ante*, n. 44-54.

¹⁰¹ R. L., c. 48, §§ 13-15; as to state highways, see R. L., c. 47, § 9; as to town ways, see R. L., c. 48, § 68.

¹⁰² R. L., c. 51, § 15.

¹⁰³ R. L., c. 51, § 12, and see *post*, n. 109-112.

¹⁰⁴ See *ante*, n. 97-99.

¹⁰⁵ See *Flagg v. Worcester*, 13 Gray 601 (1859); *Turner v. Dartmouth*, 13 Allen 291 (1866); *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327 (1890); *Kennison v. Beverly*, 146 Mass. 467, 16 N. E. 278 (1888).

upon the abutter.¹⁰⁶ It is true that in *Flagg v. Worcester*¹⁰⁷ it was held that there was no liability in tort for digging a gutter in the highway and opening it within the limits of the highway into a culvert constructed for the private drainage of the abutters. But in that case the channel which led to the plaintiff's premises was not constructed by the public authorities. Moreover, the court intimates that, if the acts in question were done in repairing the highway, the remedy was under the statute. Perhaps the fact that the culvert ran under the highway made the case resemble the decisions which hold that a certain amount of surface water may be cast in a stream into a watercourse.¹⁰⁸ Moreover, in *Daley v. Watertown*¹⁰⁹ it was held that tort would lie where the town, by license from one Coolidge, gathered surface water into a definite channel and conducted it into a pond which overflowed to the damage of the plaintiff. The latter case seems conclusive against any common-law right of the authorities to turn water in a stream upon the land of an abutter.

But the authorities may gather surface water into a definite channel and conduct that channel within the limits of the highway without incurring tort liability to the abutter. Where the public authorities dug a watercourse within the limits of the highway, an abutter who was thereby incommoded could not maintain an action of tort.¹¹⁰ And where highway surveyors, acting within the scope of their authority, dug a watercourse in the highway, evidence that they acted from malicious motives was held to be immaterial.¹¹¹ Again, where a natural watercourse rises within the limits of the highway and lower riparian owners consent to its diversion, the stream may be carried in front of plaintiff's property in an open ditch.¹¹² In all these cases the remedy of the plaintiff, if any, is under the statute,¹¹³ which makes special provision for dealing with the wash in ways.¹¹⁴

¹⁰⁶ *Franklin v. Fisk*, 13 Allen 211 (1866); *Daley v. Watertown*, 192 Mass. 116, 78 N. E. 143 (1906). See also *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327 (1890); *Westcott v. Boston*, 186 Mass. 540, 72 N. E. 89 (1905); *Smith v. Gloucester*, 201 Mass. 329, 87 N. E. 626 (1909).

¹⁰⁷ 13 Gray 601 (1859).

¹⁰⁸ See *ante*, n. 55-62. Cf. n. 63-71.

¹⁰⁹ 192 Mass. 116, 78 N. E. 143 (1906).

¹¹⁰ *Elder v. Bemis*, 2 Metc. 599 (1841).

¹¹¹ *Benjamin v. Wheeler*, 8 Gray 409 (1857); 15 Gray 486 (1860).

¹¹² *Nealley v. Bradford*, 145 Mass. 561, 14 N. E. 652 (1888).

¹¹³ R. S., c. 25, § 5; G. S., c. 44, § 10; P. S., c. 52, § 12; R. L., c. 51, § 12.

¹¹⁴ *Ante*, n. 110-112.

It has been already shown that tort will not lie where the public authorities turn surface water from a highway upon an abutter unless the water be gathered in an artificial channel. But the highway statute makes liberal provision for those injured by public work in respect of highways.¹¹⁵ Injury due to surface water has been held a proper element of such damage. Thus, in *Walker v. Old Colony R. R. Co.*,¹¹⁶ it was held that injury due to surface water might be recovered under the railroad statute.¹¹⁷ And where a statute gave damages to "any person injured in his property,"¹¹⁸ by reason of the removal of obstructions in Stony Brook, it was held that injury caused by the removal of culverts might be recovered, even though no common-law right of the petitioner had been infringed.¹¹⁹ These cases indicate the liberal spirit in which such acts are construed.¹²⁰

The precise case has arisen under that section of the statute which gives damages for injury resulting from repairs¹²¹ in ways. In *Woodbury v. Beverly*¹²² a petition was brought for damages under P. S., c. 52, § 15, and evidence was offered that by reason of the repairs the wash from the streets was cast upon petitioner's property and that surface water was prevented from escaping therefrom, and the court, over respondent's objection, permitted the case to go to the jury upon these points. In holding this ruling was proper, Morton, J., said (p. 248):

"If the repair causes surface water to flow or remain upon premises where it did not flow or remain before, and such premises are thereby rendered damp, wet, unhealthy and less valuable than before, the landowner certainly 'sustains damage in his property' by reason of the repair. It is none the less a damage because resulting from surface water which the action of the town in the repair of its way has caused to flow or remain on the premises of the landowner."

In view of this case it is probable that a similar liberal construction will be given to the section¹²³ which gives damages for laying out

¹¹⁵ See NICHOLS, LAND DAMAGES, chs. iii, iv. See also *ante*, n. 50-54.

¹¹⁶ 103 Mass. 10 (1869).

¹¹⁷ G. S., c. 63, §§ 21, 22.

¹¹⁸ Cf. R. L., c. 48, §§ 13, 68, and R. L., c. 51, § 15.

¹¹⁹ *Boston Belting Co. v. Boston*, 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903).

¹²⁰ See *ante*, n. 50-54, 115.

¹²¹ P. S., c. 52, § 15, now R. L., c. 51, § 15.

¹²² 153 Mass. 245, 26 N. E. 851 (1891).

¹²³ R. L., c. 48, §§ 13-15. As to town ways, R. L., c. 48, § 68.

of ways which is manifestly *in pari materia*, with the section here construed.¹²⁴

One further question must be considered, though the authorities in regard to it are rather hazy. We have seen that the public authorities must make provision for natural water courses, and have no inherent right to gather water into a stream and cast it upon the abutter. Also the public authorities are confined within the limits of the highway location.¹²⁵ How far may the public authorities upon payment of compensation "take" a right to interfere with natural streams or to collect water into a stream and cast it upon the abutter as an incident to laying out or relocating the highway? The cases intimate that under present statutes the power of the public authorities is exhausted when the highway is located, and that there is no power to take additional easements in land beyond the limits of the location for the benefit of the highway.¹²⁶ None of the cases last cited¹²⁶ deals with the disposition of waters by the public authorities. On the other hand the legislature may confer power to deal with natural streams,¹²⁷ and it would seem might authorize the creation and disposition of artificial streams. It has likewise been intimated that a railroad corporation might in case of necessity and upon payment of compensation have incidental power to discharge water in a stream upon land not taken.¹²⁸ Conceivably this principle might be extended to the public authorities who are charged with the duty of laying out ways, though this seems very doubtful.¹²⁹ In the absence of express decision the solution of the problem seems to lie in legislative enactment.

The cases then point to the following conclusions:

1. When a highway is laid out across a natural watercourse, a bridge or culvert sufficient to accommodate the natural flow of the stream must be provided and maintained by the public; but

¹²⁴ See also n. 50-54, 116, 119.

¹²⁵ *Preston v. Newton*, 213 Mass. 483, 100 N. E. 641 (1913). See also n. 10 and 11.

¹²⁶ *Preston v. Newton*, 213 Mass. 483, 100 N. E. 641 (1913); *Doon v. Natick*, 171 Mass. 228, 50 N. E. 616 (1898); *Simonds v. Walker*, 100 Mass. 112 (1868).

¹²⁷ See n. 23, 39, 44, 64-66.

¹²⁸ *Curtis v. Eastern R. R. Co.*, 9 Allen 55 (1867); *Babcock v. Western R. R. Corp.*, 9 Metc. 553 (1845).

¹²⁹ See n. 126, 106.

provision need not be made at that time for extraordinary freshets or for subsequent changes under public authority.

2. When a natural watercourse crosses the highway, surface water may be gathered into a stream and cast therein without liability in tort for increasing the flow of the stream or for pollution, unless the increase or pollution is so great as to constitute a nuisance; but the cases intimate that there may be a remedy in damages under the statute.

3. Tort does not lie for turning surface water from the highway upon an abutter unless the water be turned upon him in a definite channel, nor will tort lie for overflow or percolation of surface water from gutters or cesspools; but it has been held that there is a remedy under the statute when such injury is caused by repairs in the highway, and it seems probable that a similar construction will be given to other damage sections of the highway statute.

4. Where a statute authorizes certain acts, equity will not restrain them nor will tort lie for them; instead, recovery must be sought in the manner prescribed by the statute, although there may be a remedy in tort if the powers conferred be exercised negligently or improperly. In theory this distinction may be clear, but in practice the precise line of demarcation is very difficult to determine. As a practical matter, the safe procedure is to bring both a petition for damages under the statute and an action of tort and then try both cases together. This was done in *Boston Belting Co. v. Boston*, *supra*, 119.

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FREEDOM OF CONTRACT UNDER THE CONSTITUTION. — Four recent cases suggest under a variety of aspects the single problem, how far may the legislature regulate the terms of contracts without infringing the constitutional guarantees of liberty and property, which have been construed to include liberty of contract.¹ A well-defined line divides the cases in which such legislation is upheld into two classes, according to the grounds upon which the regulation is justified: first, statutes upheld because they subserve certain public interests; secondly, statutes upheld as an exercise of special and peculiar powers vested in the legislature. As will be seen, these two justifications, while logically distinct, are sometimes both present in the same case.

Complete freedom of contract is inconsistent with the necessity in a highly organized community for legislation to safeguard the public health, morals, safety, and general welfare. The limitations which are from time to time imposed as legislatures feel this necessity are usually upheld by the courts as an exercise of the police power.² Fortunately the bounds of this vague residuum of sovereignty have never been precisely defined. It has been the automatic governor in our constitutional machinery, and with some conspicuous exceptions³ it has kept pace with the

¹ See an article entitled "Liberty of Contract," by Prof. Roscoe Pound, 18 YALE L. J. 485.

² Noble State Bank v. Haskell, 219 U. S. 104; see Hudson Water Co. v. McCarter, 209 U. S. 349, 355.

³ Lochner v. New York, 198 U. S. 45; State v. Julow, 129 Mo. 163; Adair v. United States, 208 U. S. 161.

necessities of our increasingly complex civilization. The more enlightened tribunals have usually refused to take the extreme measure of condemning a law, unless it was palpably arbitrary and had no reasonable connection with the general welfare.⁴

A striking illustration of this commendable attitude, especially noteworthy as proceeding from the New York Court of Appeals, is to be found in one of the recent cases referred to. A statute was upheld which required every factory and mercantile establishment to give its employees twenty-four consecutive hours of rest in every seven days.⁵ *People v. Klinck Packing Co.*, 52 N. Y. L. J. 1925 (Ct. App.). The statute has a manifest resemblance to Sunday laws, which are almost universally upheld,⁶ but there is an important difference. Whereas Sunday laws subserve the public interest in two respects, by securing a peaceful and quiet day for public worship, and providing a day of rest and recuperation for the toiler, this enactment has only the latter ground to stand on. Its provisions impose additional restrictions only on those who are not already bound to obey the Sunday law. No previous case has been found, which even to this limited extent upholds a restriction of working hours for men equally with women and children, solely as a humanitarian measure and without the supporting consideration of Sunday as a day of general rest. But the court does not for that reason condemn the law. It recognizes that the Constitution does not require a dynamic society to conform to static legal concepts embalmed in the books, and that reasonable men may well think one day a week of enforced idleness a cheap and effective form of preventive medicine.

In contrast with this result stands a recent decision of the United States Supreme Court. Six of the justices held that a state could not forbid an employer to require of an employee an agreement to surrender membership in a union, as a condition of either securing or continuing in a job.⁷ *Coppage v. Kansas*, 236 U. S. 1. The ground of decision is that such a statute makes the "levelling of inequalities of fortune" an end in itself, and not an incident to the promotion of the general welfare.⁸ This presupposes a major premise, which is

⁴ See *Gundling v. Chicago*, 177 U. S. 183, 188; in *Erie R. Co. v. Williams*, 233 U. S. 685, 699, the court said: "The legislature is in the first instance the judge of what is necessary for the public welfare. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

⁵ LABOR LAW, Art. 6, § 8 a; CONSOLIDATED LAWS, c. 31 (LAWS OF 1909, c. 36) as amended LAWS OF 1913, c. 740; PENAL LAW, § 1275.

⁶ *Hennington v. Georgia*, 163 U. S. 299, and cases cited.

⁷ KANSAS SESSION LAWS OF 1903, c. 222; GEN. STAT. KANSAS, 1909, §§ 4674, 4675. Similar statutes have been passed by Congress, and by the legislatures of California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Wisconsin, and Porto Rico. See BULLETIN OF THE BUREAU OF LABOR STATISTICS, No. 148, vols. 1 and 2.

⁸ The court considers itself bound by its unfortunate decision that Congress could not forbid an interstate railroad to discharge an employee solely because of his affiliation with a union. *Adair v. United States*, 208 U. S. 161, criticised by the Hon. Richard Olney, in 42 AM. L. REV. 164. See FREUND, POLICE POWER, § 326, for a statement of the ground on which the *Adair* case may be distinguished from the principal case. Day and Hughes, JJ., take this distinction, while Holmes, J., would overrule the *Adair* case. Another recent case extends the prohibition of the Fourteenth Amendment to a statute requiring a corporation to give an employee a true statement of the reason for dismissal. *St. Louis S. W. Ry. Co. v. Griffin*, 171 S. W. 703

deduced from the nature of things, that no statute which makes the "levelling of inequalities of fortune" an end in itself can reasonably tend to promote the public welfare. But the Supreme Court has upheld the following laws, which in the principal case are conceded to involve an incidental "levelling:" limiting hours of labor in dangerous employments;⁹ requiring semi-monthly payment of wages;¹⁰ requiring payment of wages in money instead of merchandise;¹¹ and securing a fair standard for estimating wages.¹² An observer would not have to be irrational to conclude that each of the specific evils which these statutes were directed against had a common source in the "inequality of fortune" between laborer and employer, which compels the laborer who contracts single-handed to accept a job on whatever terms it is offered to him. Unions are a reasonable way of overcoming this inequality, and hence depriving the employer of one weapon against unions is no more than striking a blow at the root of the above admitted evils. It is submitted that there is nothing palpably arbitrary in such a law. Statutes directed against "inequalities of fortune" may be always futile and generally ill-advised, but it is submitted that they are not invariably opposed to the general welfare and necessarily unconstitutional. The court declared a sounder doctrine when it said: "The Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference."¹³ What is the sacred nebula surrounding a "real difference" of fortune that it should be made an exception to the rule?

In the second group of cases, statutes regulating contracts are sustained on more technical grounds, either as a supervision of public works, or as an exercise of the state's power over corporations. It is now recognized in many courts that a state, like any other business enterprise, may make rules for its officials, servants, and administrative agencies in the transaction of public affairs.¹⁴ But recently a New York law requiring municipal corporations to employ on public works only United States citizens¹⁵ was condemned as depriving aliens of their rights under the Fourteenth Amendment.¹⁶ *People v. Crane*, 52 N. Y. L. J. 1408 (N. Y. App. Div.). With unimpeachable reasoning the opinion proves that the Fourteenth Amendment protects resident aliens as well as citizens, and that the statute is not within the legitimate scope of the police power. But as no one is entitled, of absolute right, to work for the state

(Tex.). There must always be some reason, if only sheer caprice. There seems no objection to compelling an employer to make a statement of it.

⁹ *Holden v. Hardy*, 169 U. S. 366; *Muller v. Oregon*, 208 U. S. 412.

¹⁰ *Erie R. Co. v. Williams*, 233 U. S. 685.

¹¹ *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

¹² *McLean v. Arkansas*, 211 U. S. 539.

¹³ See *Quong Wing v. Kirkendall*, 223 U. S. 59, 63.

¹⁴ Statutes restricting hours of labor: *Atkin v. Kansas*, 191 U. S. 207; *Ellis v. United States*, 206 U. S. 246; *People v. Metz*, 193 N. Y. 148, 85 N. E. 1070. *Contra*, *Cleveland v. Clements Bros. Con. Co.*, 67 Oh. St. 197, 65 N. E. 885; *Ex parte Kubach*, 85 Cal. 274, 24 Pac. 737. Statutes settling minimum wage: *Mallette v. Spokane*, 137 Pac. 496 (Ore.). *Contra*, *Street v. Varney Co.*, 160 Ind. 338, 66 N. E. 895. Statute requiring public printing to be done within state: *Ex parte Gemmil*, 20 Idaho, 732, 119 Pac. 298.

¹⁵ LABOR LAW, Art. 2, § 14; LAWS OF 1909, c. 36.

¹⁶ It is beyond the scope of this note to consider the possible objections to this statute as a violation of treaty obligations of the United States.

or its agencies,¹⁷ there can be no deprivation in respect of the alien. The state, like any other employer, is not restricted by the Constitution from a free choice of its employees.¹⁸ The municipality cannot object, for the great weight of authority holds that as an administrative agency of the state in carrying on public works it is subject to the directions of the state.¹⁹

Statutes which have nothing to do with the performance of public works, but which apply only to corporations, municipal and private, have been sustained as an exercise of the special legislative power to amend the charters of domestic corporations which is now reserved in nearly all states, and to regulate the admission of foreign corporations.²⁰ The limitations on this twofold power have not been worked out with any degree of exactness.²¹ In many cases this justification is relied upon by the courts as an additional ground to support statutes which come under the police power. The right to exclude foreign corporations before they acquire property in the state is extremely broad,²² and, generally speaking, any provision can be inserted by amendment into the charter of a domestic corporation which could have been introduced at the time of the original grant.²³

If a statute restricts liberty of contract and cannot be upheld on any of these grounds, it is invalid. An illustration is provided by the recent decision condemning the Arizona Alien Act, which applied indiscriminately to all employers of labor. *Raich v. Attorney-General*, U. S. Dist. Ct., Dist. of Arizona. (Not yet reported.) It promoted no legitimate public interest, and being of general application, advantage could not be taken of the narrower justification on which the New York statute should have been upheld.

THE RIGHT OF PUBLICITY. — A recent English case seems to recognize as appurtenant to premises abutting on a public way a right to have neighboring portions of the highway free from obstructions which unreasonably interfere with the view of the premises from the highway. *Cobb v. Saxby*, [1914] 3 K. B. 822.¹ In contradistinction to the right of privacy of the person, this might well be called the right of publicity. In this case one of two adjoining landowners was enjoined from

¹⁷ See *Atkin v. Kansas*, 191 U. S. 207, 223.

¹⁸ *People v. Ludington's Sons*, 131 N. Y. Supp. 550. *Contra*, *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

¹⁹ *Hunter v. Pittsburgh*, 207 U. S. 161, and cases cited *supra*, note 14. This right of regulation depends upon the public character of the work, and not upon the state's right to revoke the municipal charter at will. *Keefe v. People*, 37 Colo. 317, 87 Pac. 791. (The municipal corporation was created by the state constitution, for the express purpose of preventing legislative alterations in its charter.)

²⁰ *Erie R. Co. v. Williams*, 233 U. S. 685; *State v. Brown & Sharp Mfg. Co.*, 18 R. I. 16, 25 Atl. 246; *Shaffer v. Mining Co.*, 55 Md. 74.

²¹ For comment on this right, see 20 HARV. L. REV. 634.

²² *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246. See also 28 HARV. L. REV. 304.

²³ *Erie R. Co. v. Williams*, *supra*.

¹ For a more complete statement of this case, see RECENT CASES, p. 520, and 111 T. L. R. 814.

maintaining signboards projecting over the street so as entirely to obscure the view from the street of the side wall of his neighbor's building, which projected beyond the front of his own building, apparently because of a jog in the street, although there were neither doors nor windows in the wall and its sole use was for advertising purposes.²

It seems now well settled that the owner of land abutting upon a public highway possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent street for the benefit of his abutting lands.³ Naturally enough there is but little direct support in the authorities for the additional right which the principal case seems to recognize, since it is seldom infringed without infringing one or more of the more firmly established rights to light, air, and access,⁴ but relief has occasionally been granted where the plaintiff suffered no other substantial damage than the obstruction of the view of his premises from the street.⁵ Moreover, since the obstruction complained of is generally also an obstruction of the public easement of passage, the courts usually base the relief upon the ground that the plaintiff suffers "special" or "peculiar" damage from a public nuisance.⁶ If the adjoining landowner suffers actual damage because his right of passage over the highway is infringed, he may properly sue as an individual injured by the obstruction of the public right of passage,⁷ but unless he is in some way injured *because* the public right is violated, there is absolutely no basis for a right of action on that ground.⁸ On the contrary assumption that a private individual may always enjoin a public nuisance whenever by a mere coincidence it causes him pecuniary loss in some altogether collateral way, the maintenance of the lower portion of the boards in the principal case might perhaps have been enjoined on this ground, since they were

² Although the reports describe this building as projecting into the street, this is probably a misdescription; otherwise the injunction should have been denied because of unclean hands. *Brutsche v. Bowers*, 122 Ia. 226, 97 N. W. 1076.

³ *Muhler v. New York & H. R. Co.*, 197 U. S. 544; *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82. See 4 HARV. L. REV. 75; 15 *id.* 305. It has been declared that these rights are limited to the portion of the highway upon which the premises immediately abut. See Opinion of the Justices, 208 Mass. 603, 606, 94 N. E. 849. It is submitted that this limitation is narrow, for the owners' rights do not depend on the ownership of the fee in the highway. *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 25 N. E. 496. And it seems to be generally disregarded. *Benjamin v. Storr*, L. R. 9 C. P. 400, and cases *infra*, note 4.

⁴ The following cases recognized obstruction of the view to the premises as an element of legal damage where other rights were also infringed. *First National Bank v. Tyson*, 133 Ala. 459, 32 So. 144; *Green v. Thresher*, 235 Pa. St. 169, 83 Atl. 711; *John Ainsfield Co. v. Edward B. Grossman Co.*, 98 Ill. App. 180; *Hallock v. Scheyer*, 33 Hun (N. Y.) 111.

⁵ *Perry v. Castner*, 124 Ia. 386, 100 N. W. 84; *McCormick v. Weaver*, 144 Mich. 6, 107 N. W. 314.

⁶ *First National Bank v. Tyson*, *supra*; *McCormick v. Weaver*, *supra*; *Green v. Thresher*, *supra*; *John Ainsfield Co. v. Edward B. Grossman Co.*, *supra*. Cf. *Campbell v. Paddington Corporation*, [1911] 1 K. B. 869. For a criticism of the words "special" and "peculiar" in this connection see an article by Judge Jeremiah Smith, 15 COL. L. REV. 1, 9.

⁷ See 15 COL. L. REV. 1, 22.

⁸ This argument finds strong support in those cases in which the plaintiff has suffered damage from an act of the defendant which was also in violation of a public statute, but is denied recovery because the harm was not of the kind which the statute aimed to prevent. *Gorris v. Scott*, L. R. 9 Exch. 125.

probably a public nuisance.⁹ But the upper signboards could scarcely be regarded as such an illegal obstruction of the highway,¹⁰ and the court made no distinction, but rightly based its decree entirely on the infringement of the adjoining owner's private right. To entitle him to relief, recognition of the right of publicity as a private right in no way dependent upon interference with the public easement is essential, not only in the comparatively rare cases, where no such interference occurs, but also where the obstruction has been legally authorized by the state or municipal authorities. Consequently, decisions granting relief in such cases are direct authority for this so-called right of publicity, except in so far as they can be based upon the violation of other rights involved.¹¹

While it seems eminently desirable under modern conditions that the existence of such a right should be recognized, it is to be observed that only a substantial obstruction of the view from the street should constitute a violation of it.¹² In this it is to be distinguished from the easement of access, any interference with which is actionable,¹³ and is more nearly analogous to the easement of ancient lights.¹⁴

VALUATION OF PUBLIC SERVICE FRANCHISES. — It is a judicial commonplace that "a franchise is property." But this statement, like many another legal axiom, is fraught with ambiguity.¹ It does not distinguish

⁹ *Commonwealth v. Wilkinson*, 16 Pick. (Mass.) 175; *Commonwealth v. King*, 13 Metc. (Mass.) 115. See also 2 ELLIOTT, STREETS AND HIGHWAYS, 3 ed., § 832.

¹⁰ *Loth v. Columbia Theatre Co.*, 197 Mo. 328, 94 S. W. 847; *Chambers v. Ohio Life, etc. Ins. Co.*, 1 Disney (Oh.) 327, 335; *Hawkins v. Sanders*, 45 Mich. 491, 8 N. W. 98.

¹¹ *Perry v. Castner*, *supra*; *Alabama Terminal R. Co. v. Crawford*, 10 Ala. App. 296, 64 So. 650.

¹² The cases in which relief has been denied may be distinguished on this ground, although the language of some of them is broad enough to deny the existence of such a right altogether. *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859; *Cummins v. Summuduwat Lodge*, 9 Kan. App. 153, 58 Pac. 486; *Wornser v. Brown*, 149 N. Y. 163, 43 N. E. 524; *Hawkins v. Sanders*, *supra*; *Tracy v. Le Blanc*, 89 Me. 304.

¹³ See 15 COL. L. REV. 142, 154.

¹⁴ See SALMOND, TORTS, § 81. The principal case might perhaps be supported on the additional ground that there was no justification for the damage intentionally caused by the obstruction. *Burker v. Smith*, 69 Mich. 380, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381. See also *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946. *Contra*, *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308; *Letts v. Kessler*, 54 Oh. St. 73, 42 N. E. 765. But there is little likelihood that this so-called "spite fence" doctrine would be followed in England. *Potts v. Smith*, L. R. 6 Eq. 311, 317. This question, however, is less likely to arise there because the obstruction is generally justified in order to prevent the acquisition of an easement of light. See 2 WASHBURN, REAL PROPERTY, 6 ed., 319; TUDOR, LEADING CASES, 3 ed., 201. Such a justification would not obtain where only the view of the premises is involved. *Smith v. Owen*, 35 L. J. Ch. 317. Consequently, the question might well arise where the obstruction was on private property.

¹ The cases abound in sweeping statements to the effect that a franchise is "taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested . . . with the attributes of property generally." *People v. O'Brien*, 111 N. Y. 1, 41, 18 N. E. 692, 699. Such language is obviously too broad. Not all franchises are inheritable and alienable, and in the absence of an express provision to the contrary such franchises are

as to the character of the "franchise," nor as to the purpose for which it is to be considered "property." For the sake of clearness, exclusive and irrevocable privileges must be differentiated from franchises which amount to mere revocable licenses, and varying principles will apply to these as the cases have to do with taxation, eminent domain, or rate regulation. All the authorities agree that a franchise, whether revocable or irrevocable, may be taxed.² Although this conclusion is reached by varied and often devious methods, the correctness of the result cannot be doubted. Such a privilege authorizes the gainful use of private property in a particular manner. As this is a valuable right, it should be taxed as such during its existence.³ But such value continues only up to the time when the state acts, and when acquisition by eminent domain or regulation of rates is in question different principles apply. Where there is a limitation on the state's right to revoke the franchise, or the holder of it has been promised certain privileges, the contract clause of the Constitution will protect the agreement.⁴ Such rights have an undoubted value and cannot be taken away without compensation, but on principle it would seem at least arguable whether the holder can demand to earn a dividend on them.⁵

But, however that may be, when the state has given a mere grant of user and has not bound itself in any way, when the franchise amounts to no more than a revocable license, what possible claim has the grantee of such a privilege to any allowance, either by way of compensation in eminent domain proceedings, or of valuation in proceedings to regulate rates, beyond perhaps the actual expense incurred in obtaining the grant? ⁶ "The franchise has added no producing power to the realty or

subject to the state's power to fix reasonable rates. This "property" is of such a peculiar nature that its value may be largely destroyed by the power of the state to fix rates unless there is an express guaranty to the contrary. See *Detroit v. Detroit*, etc. Ry., 184 U. S. 368; *Vicksburg v. Vicksburg*, etc. Co., 206 U. S. 496. Nor do they deprive a municipality of the right to supply itself. *Hamilton, etc. Co. v. Hamilton City*, 146 U. S. 238.

² See *People v. O'Brien*, *supra*; *Society for Savings v. Coite*, 6 Wall. (U. S.) 594; *Brisbane v. Brisbane*, etc. Co., 9 Queens. L. J. 67; BEALE AND WYMAN, RATE REGULATION, § 363.

³ This tax "is quite consistent with the value of the franchise being subject to diminution by a diminished income as a result of legislation reducing rates." BEALE AND WYMAN, RATE REGULATION, § 363.

⁴ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674. In such cases, of course, the courts will construe the agreement strictly in favor of the state. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1.

⁵ Where there is, for example, a franchise, irrevocable for a definite period of time, the only right properly protected under the Constitution would seem to be that of doing business at reasonable rates during that period. This certainty, doubtless, will increase the market value of the company's securities. It will have to be paid for if the state acquires it by eminent domain, because this constitutionally protected certainty of earning power is being taken. But by what right does the company claim to earn a return on this intangible property? It has not dedicated any property to a public use. It has simply accepted a valuable gift which it is admitted is irrevocable; but why does that fact lead to the result that the public served by the company should pay higher rates to the company? It would seem that the contract which is protected is, as has been said before, only the right to earn reasonable rates on the tangible property for the given period.

⁶ In such a case, condemning the property is equivalent to a revocation of the revocable license. See *Kingsland v. Mayor of New York*, 110 N. Y. 569, 583.

personalty, it has simply authorized their employment in a particular way.”⁷ This authorization gives the right to operate as a profitable going concern what would otherwise be a job lot of material.⁸ Not satisfied with the privilege of using its property in a profitable employment, the contention on behalf of the public service company is that such a privilege is property for which it must be compensated when deprived of it, and upon which it is entitled to earn a return. A practical difficulty is at once suggested as to the method by which such a franchise could be valued. In a rate case, the problem seems without solution. For to determine what rates are reasonable, we look at the present value of the property on which the company has a right to earn returns. The value of this revocable franchise before the state acts, results from the rates which the state then allows the company to charge. If the franchise be given a value based on these present rates and this be included in present value, the logical result of the vicious circle must be that the rates of a public service company can never be regulated by the state.⁹ While some of the courts balk at the application of this doctrine to rate regulation, they do not seem to realize that an equal absurdity will follow from giving value to a revocable franchise in the eminent domain cases. If one grants that present earning power may give value in an eminent domain case but asserts that it must not be considered in rate-making, a state need only regulate first and condemn later to achieve the desired result. Such a *reductio ad absurdum* shows that the two classes of cases must stand on common ground.¹⁰ The authorities on this subject

⁷ See Consolidated Gas Co. v. City of New York, 157 Fed. 849, 874. The court in *People v. O'Brien*, *supra*, seeks to distinguish between a mere privilege to engage in business and a privilege to use public property; but in each case, so far as the interest of the public service company goes, its property is not made more productive except in the sense that the right to use it in a certain way or in a certain place gives the owner of the right an increased income. The property dedicated to the public use is affected equally in the two situations.

⁸ From the very nature of the franchise right it is responsible for a large part of a company's value as a “going concern,” which almost all courts recognize as a proper item in a property valuation. See *National Water Works v. Kansas City*, 62 Fed. 853; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Omaha v. Omaha Water Co.*, 218 U. S. 180. As was said in *Brunswick Water District v. Maine Water Co.*, 99 Me. 371, 375-381 (cited in BEALE AND WYMAN, RATE REGULATION, § 362, as opposed to the separate valuation of franchises), the franchise is what makes the structure legally “a going concern structure,” and that the property cannot “be valued in entire disregard to its franchise characteristics,” and “that the value of money invested, in whatever form it now is, is affected by the right to use it in that form.” Such a recognition of the existence of the franchise stands on quite a different ground from that which seeks to capitalize present income.

⁹ But such a result is unthinkable. As Mr. Justice Holmes said on this general question, in *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 669, “On the one side, if the franchise is taken to mean that the most profitable return that could be got free from competition is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. . . . Neither extreme can have been meant.” See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, as an example of the attitude taken by the Supreme Court in a typical case of rate regulation.

¹⁰ The courts have recognized this fact frequently. “The question of what is just compensation in such a case [a rate case] is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain. . . .” *San Diego Water Co. v. San Diego*, 118 Cal. 556, 567, 50 Pac. 633,

are in a state of confusion. In general the cases say broadly that such a franchise must be valued when the state wishes to acquire the property of the company by eminent domain.¹¹ The only square authority for this, however, seems based on a misunderstanding of the decision of the Supreme Court of the United States in the Monongahela Case.¹² Whatever the opinion of that learned body may then have been on the general question of revocable franchises, it was not presented to it for decision in that case.

The Supreme Court has not as yet passed on the question of valuing such franchises in rate regulation, expressly reserving it in the Consolidated Gas Case.¹³ The New Jersey courts have recently had the question before them. *Public Service Gas Co. v. Board of Public Utility Commissioners*, 92 Atl. 606.¹⁴ Judge Swayze, speaking for the Supreme Court of the state, held that a franchise should not be valued for rate purposes beyond the amount which was expended to secure it.¹⁵ The

636. And to the same effect see the opinion of Morrow, J., in *Spring Valley Water Works v. San Francisco*, 124 Fed. 574, 594 (Circ. Ct.).

¹¹ When the facts of these cases are examined it will be found that there is either a contract protected by the Constitution or some facts to show the intention of the legislature that the company should earn returns on some sum of money which has been determined by that body to be the value of the franchise. See, for example, *Montgomery County v. Schuylkill Bridge Company*, 110 Pa. St. 54, 20 Atl. 407, where the franchise was a perpetual one; and the Monongahela Case, which is explained *infra*, note 12.

¹² In that case, *Monongahela Navigation Co. v. United States*, 148 U. S. 312, the charter of incorporation of the company gave the state an option to take over the property at a fixed sum, and the case decided that until this option was exercised the company had an irrevocable franchise, and that since the national government was not suing as the assignee of the state's right, it must pay for this franchise just as in any case of condemnation of an irrevocable privilege. See PAMPHLET LAWS OF PENNSYLVANIA for 1840, 677, and also the official record of the Monongahela Case in the Supreme Court, at 33, 39, 50. Ignoring these facts, it has been said upon the supposed authority of this case that a revocable franchise is to be valued for purposes of eminent domain. *Spring Valley Water Works v. San Francisco*, 124 Fed. 574, 594, is a square decision to this effect. For a *dictum* looking the same way, see the decision of the lower court in the Consolidated Gas Case, *supra*, 875. See also *Town of Bristol v. Bristol and Warren Water Works*, 23 R. I. 274, 49 Atl. 974. But see WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS, § 664; *Norwich Gas, etc. Co. v. City of Norwich*, 76 Conn. 565, 57 Atl. 746; *Kennebec Water District v. Waterville*, 97 Me. 185, 54 Atl. 6; *Appleton Water Works Co. v. Railroad Commission*, 154 Wis. 121, 142 N. W. 476; *Newburyport Water Company v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Gloucester, etc. Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

¹³ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19. The basis of the decision of the court in allowing value to be given to the franchise in that case was a valuation which had been made under a legislative act and which had been acted upon for many years by the company and the investing public. (47) The court does not give an opinion upon the result in the absence of such an agreement, but says that the case must stand "upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally." (48) See the opinion of Hough, J., in the lower court, *Consolidated Gas Co. v. City of New York*, *supra*, 872, for a very careful discussion of the general question. Franchise value is discussed and disallowed in the following rate cases: *Lincoln Gas, etc. Co. v. Lincoln*, 182 Fed. 926 (later reversed on another ground in 223 U. S. 349); *Cumberland Telephone, etc. Co. v. Louisville*, 187 Fed. 637; *Home Telephone Co. v. City of Carthage*, 235 Mo. 644, 139 S. W. 547. See also *Cedar Rapids, etc. Co. v. Cedar Rapids*, 223 U. S. 655, 669.

¹⁴ For a complete statement of this case, see RECENT CASES, p. 526.

¹⁵ *Public Service Gas Co. v. Board of Public Utility Commissioners*, 84 N. J. L. 463, 87 Atl. 651.

Court of Errors and Appeals reversed this decision with the generous if unsound generalization that a public service company should be allowed to earn rates on the taxable value of its property, and the remark that private rather than government ownership of public utilities should be encouraged. There would seem to be no principle upon which the result of this case can be justified. If as a matter of fact a public service company deserves a greater income than that to be obtained by capitalizing the actual value of its property at the given rate of interest¹⁶ and determining its rates accordingly, the proper method is to face the issue squarely and raise the rate of interest, rather than to pad the capital account with fictitious values. Any other method savors of intellectual dishonesty.

UNREGISTERED AUTOMOBILES AND TORT LIABILITY. — It has never been easy to reconcile, or even to disentangle, the theories which the Massachusetts Supreme Judicial Court has applied in determining the relation of illegal conduct to recovery in actions of tort. A recent decision adds perceptibly to the difficulty of the task. The defendant was the owner of an automobile, which was improperly registered. His son, with his assent, but not as his agent, took some friends for a ride in the car, and negligently injured the plaintiff. The court held that the father's failure to register the car according to law made him liable for the son's negligence. *Gould v. Elder*, 107 N. E. 59.

The historical background of the decision is complex. One group of cases, denying recovery for injuries sustained by travelers on Sunday who were not engaged in errands of mercy or of necessity, is now but a memory of the past, quaintly flavored with New England Puritanism.¹ The more modern Massachusetts law on the subject has its foundation in two cases decided some thirty years ago. One held that illegal conduct on the part of the defendant, where it is a contributing cause of the injury, does not of itself render him liable, but is merely evidence of his negligence.² In the other the plaintiff's violation of a traffic ordinance, directly contributing to his own injury, was held an absolute bar to his recovery.³ With the advent of the automobile and the multiplication of

¹⁶ As to what is a proper rate of interest authorities differ. In the principal case a return of eight per cent was allowed upon the inflated valuation adopted by the court. Six per cent is a usual figure, and seven per cent was named as a proper return if the franchise "value" was not to be included, by Charles W. Needham, in his article on "Franchises," 15 COL. L. REV. 97.

¹ The Sunday law cases are collected in *Smith v. Boston & Maine R.*, 120 Mass. 490. They have since been overruled by statute. R. L. c. 98, § 17. The theory of the cases has been criticised on the ground that it fails to distinguish between illegality which is a cause rather than a mere condition of the injury. See *Sutton v. Wauwatosa*, 29 Wis. 21; *Johnson v. Irasburgh*, 47 Vt. 28. The latter case, however, justifies the result where the defendant is a municipality, on the ground that no duty of care was owed to persons unlawfully on the highway.

² *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310. For a criticism of this view, see an article by Dean Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 321 ff.

³ *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555. The court denied that there was any inconsistency in thus treating a plaintiff with greater

traffic regulations, however, these two theories seem to have been considered inadequate, and still a third view was adopted. Where the plaintiff's illegal conduct consisted in driving an unregistered car, recovery for an injury due to the defendant's negligence was denied, although failure to register the car in no way contributed to the injury, on the ground that the automobile laws made the car an outlaw on the highway.⁴ This outlawry, it was subsequently established, embraces innocent passengers as well.⁵ And it seems to have been assumed that it would not only bar the owner of the car as plaintiff, but make him liable regardless of due care as defendant.⁶

Here were three distinct theories of the relation of illegal conduct to tort liability. A fourth was soon to emerge. In the case of *Bourne v. Whitman*⁷ the illegal element was the circumstance that the operator's license of the defendant had expired. The court held that this did not make the car an outlaw; but it said that the lack of an operator's license would be evidence of the driver's lack of skill in managing the car. This *dictum* is not easy to understand.⁸ The lack of a license might under some circumstances be evidence of the general incompetence of the driver, where that is in issue, although as a rule the logical relevancy would be faint. This would perhaps explain the decision in a subsequent case, which held erroneous the refusal by the trial court to instruct that the fact that a chauffeur hired by the plaintiff had no license was evidence of the plaintiff's negligence.⁹ But the rule as laid down in

severity than a defendant, saying, by Knowlton, J., that "in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression, will receive no favor."

⁴ *Dudley v. Northampton St. Ry. Co.*, 202 Mass. 443, 89 N. E. 25. The decision is made to turn on the language of § 3 of the automobile laws (STAT. 1903, c. 473), providing that "except as otherwise provided herein no automobile or motor cycle shall . . . be operated upon any public highway . . . unless registered as above provided." It was said that the purpose of the statute was to protect travelers on the highway by giving them means of identifying an automobile which injures them, and that a car not so registered was a "forbidden and dangerous machine." In other jurisdictions this view has not been adopted, registration being regarded as a revenue measure, not designed to affect civil liability. *Atlantic Coast Line R. Co. v. Weir*, 63 Fla. 69, 58 So. 641; *Hemming v. New Haven*, 82 Conn. 661, 74 Atl. 892; *Lockridge v. Minneapolis & St. L. Ry. Co.*, 140 N. W. 834 (Ia.). See 27 HARV. L. REV. 93.

⁵ *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 366.

⁶ The reasoning in *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, goes on this assumption. This would indicate that the doctrine is not so much that no duty of care is owed to a trespassing automobile, as that the operation of an unregistered car is legally so reprehensible that the illegality is equivalent to negligence. The language of the opinion in *Dudley v. Northampton St. Ry. Co.*, *supra*, gives support to this view.

⁷ *Supra*, n. 6.

⁸ The court's position is indicated in the following extract from the opinion of Knowlton, C. J.: "If in any case the failure to have a license, looking to those conditions that ordinarily accompany the failure to have it, is a cause contributing directly to an injury, a violator of the law would be legally responsible to another person injured by the failure; or, if he is injured himself, would be precluded from recovery against another person who negligently contributed to the injury. But we are of opinion that his failure in that respect is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of the plaintiff, it is shown to be a contributing cause to the injury sued for, in which case it is a bar to recovery."

⁹ *Conroy v. Mather*, 217 Mass. 91, 104 N. E. 487.

Bourne v. Whitman is that lack of the license is evidence of negligent management at the time of the accident. It seems unwise to violate the character rule to such an extent in favor of evidence which might tend strongly to prejudice the jury, and which in many cases can have almost no probative value.¹⁰

The ground of decision in the principal case does not fit easily into any one of these theories. If the outlaw doctrine, as extended to defendants, rests on some analogy to the liability of a landlord to third persons for a nuisance on land which existed at the time of the lease,¹¹ or to the absolute liability of the owner of a wild beast,¹² it logically justifies holding the father liable for any harm done while the car is in his son's hands.¹³ The court considers him liable, however, only for his son's negligence. This would indicate that the liability depended on principles of *respondeat superior*, a view that seems hardly tenable. By no alchemy known to the courts can the mere fact of illegality make one in law an agent who is not an agent in fact.

IS *CESTUI QUE TRUST'S* RIGHT IN *REM* OR IN *PERSONAM*? — "An use is a trust or confidence reposed in some other which is not issuing out of the land but a thing collateral annexed in privity to the estate of the land and to the person touching the land."¹ So Lord Coke in 1628 defined the right of a *cestui que trust*, a definition which few lawyers of a century ago would have dared to dispute. But in recent times there has grown up a rapidly increasing expression of opinion both among judges and text-writers that the *cestui* has more than a bare "trust or confidence" in the trustee, that he has an interest in the *res* itself, real in nature and good against everyone save a *bonâ fide* purchaser of the legal title.²

¹⁰ As in *Bourne v. Whitman*, *supra*, where the driver's license had expired only the day before the accident and was renewed two days after.

¹¹ *Delay v. Savage*, 145 Mass. 38, 12 N. E. 841.

¹² *Filburn v. People's Palace, etc. Co.*, 25 Q. B. D. 258.

¹³ In some jurisdictions the owner of an automobile who allows members of his family to take the car for a ride is held liable for their negligence, on some theory of agency growing out of the relationship. The cases are collected and criticised in 28 HARV. L. REV. 91. In these jurisdictions the problem of the principal case would not arise. But in Massachusetts this view is not adopted. Whether or not the driver of the car was an agent of the defendant is considered a question of fact in each case. See *Bourne v. Whitman*, 209 Mass. 155, 173, 95 N. E. 404, 408.

¹ Co. Lit. 272 b.

² See *Cave v. Cave*, 15 Ch. D. 639, 647; *Cory v. Eyre*, 1 DeG. J. & S. 149, 167; *Shropshire Railways, etc. Co. v. The Queen*, L. R. 7 H. L. 496, 506, 512, 514. See SALMOND, JURISPRUDENCE, 3 ed., 230 *et seq.*; WILLOUGHBY, THE LEGAL ESTATE, ch. 1; Professor Pound in 26 HARV. L. REV. 462. Lord Mansfield's view of the nature of trusts in his dissenting opinion in *Burgess v. Wheate*, 1 Eden 177 (1759) is worthy of note (p. 226): "A use or trust heretofore was (while it was a use) understood to be merely an agreement by which the trustee and all claiming from him in privity were personally liable to the *cestui que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this court is the same as the land and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared it results by necessary implication; because the trustee is excluded except where the trust is barred in the case of a purchaser for valuable consideration without notice."

In a recent case the Supreme Court of the United States seems to have added the weight of its authority to this modern conception. *Brown v. Fletcher*, 235 U. S. 589, 35 Sup. Ct. 154. The trustee and *cestui que trust* of a certain trust fund were citizens of New York. The *cestui* assigned his interest to the plaintiff, a citizen of Pennsylvania, who brought suit against the trustee in a federal District Court. Section 24 of the Judicial Code provides that the District Courts shall not have jurisdiction of "any suit to recover upon any promissory note or other *chose in action* in favor of any assignee, . . . unless such suit might have been prosecuted in such court . . . if no assignment had been made." The District Court dismissed the bill for want of jurisdiction. The Supreme Court reversed the decree apparently on the ground that the *cestui's* right under a trust was a property right and not a "*chose in action*" within § 24.³ Has the *cestui's* right, then, really become a right *in rem*?⁴

At the outset the procedural maxim that "equity acts *in personam*" must not be confused with the substantive right itself. This manner of procedure is no doubt due to an historical accident. Courts of law were gravely defective in being unable to give specific reparation for a wrong by enforcing their judgment against the defendant personally. To correct this defect, equity seized on the procedure then in use in the Ecclesiastical Courts and acted on the conscience of the wrongdoer. But the Chancellor was early confined to this one way of enforcing his decrees by the sharp jealousy of the law courts aroused by the surprisingly rapid growth of equity practice.⁵ This procedural limitation, however, has no real bearing on the true nature of the right itself.

Historically, the earliest cases of equitable rights of this kind were the uses of real property. On a feoffment to uses the feoffee acquired a complete title. He was amenable to no process whatsoever, although of course morally bound to perform.⁶ But by the middle of the fifteenth century courts of equity came to recognize the *cestui's* right and to enforce it. Originally it was purely a personal obligation against the trustee and the trustee alone.⁷ If the *res* was wrongfully conveyed to another with notice or for no consideration, no subpoena would issue against the

³ The case might be supported on the narrower ground that a *chose in action* within § 24 means a *chose in action* based on contract. In the opinion, however, the court says: "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a *chose in action*. . . . His estate in the property then in the possession of the trustee for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. . . . The instrument . . . was not a *chose in action* payable to the assignee, but an evidence of the assignee's right, title and estate in and to the property."

⁴ Austin defines a right *in rem* as one which "avails against persons generally or universally," and a right *in personam* as one which "avails against certain or determinate persons." AUSTIN, JURISPRUDENCE, 3 ed., 380. See also HOLLAND, JURISPRUDENCE, 11 ed., 144; SALMOND, JURISPRUDENCE, 3 ed., 205.

⁵ It remained for express statutory enactment in the early part of the nineteenth century to grant to courts of equity limited powers *in rem*. See POMEROY, EQUITABLE REMEDIES, §§ 13, 14, 15.

⁶ See BACON, READING UPON THE STATUTE OF USES, pp. 20, 22, 23; 3 ROT. PARL. 511, No. 112.

⁷ FITZHERBERT'S ABRIDG., tit. SUBPŒNA, pl. 19. See Y. B. 14 Hen. VIII, fol. 4, pl. 5 [AMES, CASES ON TRUSTS, 2 ed., pp. 282, 283].

transferee; or if the trustee died or married, the title descended to his heir and the widow acquired her dower free from the trust obligation.⁸ But gradually the *cestui's* rights were enlarged until they began to assume characteristics closely resembling *jura in rem*. First it was held, although with some difficulty, that the heir must perform the trust.⁹ Later the *cestui* was allowed to enforce his right against the donee, the purchaser with notice, the creditor, and the devisee of the trustee;¹⁰ until now it appears that the right of the *cestui* follows the *res* into whosoever hands it may come, save in the case of a transfer of the legal title to a purchaser for value and without notice.¹¹

On first thought this power of the trustee to cut off the *cestui's* interest by a sale to a *bonâ fide* purchaser seems fatal to any *in rem* theory. The very essence of a right *in rem* is that it shall "avail against persons generally or universally."¹² Here that is not the case as regards certain individuals; so it is argued that after all the right must be only *in personam* against the trustee.¹³ Yet rights may be rights *in rem* although as to some individuals they do not impose collective duties.¹⁴ The law is not unfamiliar with instances in which legal property rights are of no avail against certain people. The sale of a chattel in market overt will give a title good against the former legal owner;¹⁵ the transferee of money, or of a bearer bank-note, promissory note, or bill of exchange owes no duty to the original owner;¹⁶ a subsequent deed or mortgage recorded before a prior unrecorded deed or mortgage creates a right superior to that of the prior mortgagee;¹⁷ the owner of goods entrusted to a factor and wrongfully pledged by him to another is remediless under the Factor's Acts;¹⁸ a vendor in possession can pass an indefeasible title to a subsequent vendee although a vested property right is thereby cut off.¹⁹ Social welfare demands a security and stability in business trans-

⁸ BROOK'S NEW CASES, MARCH'S TRANSLATION, 95; Y. B. 8 Ed. IV, fol. 6, pl. 1 [AMES, CASES ON TRUSTS, 2 ed., pp. 285, 345]; Nash v. Preston, Cro. Car. 191. See Burgess v. Wheate, *supra*, 218.

⁹ FITZHERBERT'S ABRIDG., tit. SUBPŒNA, pl. 14, citing Y. B. 14 Ed. IV (1472) [AMES, CASES ON TRUSTS, 2 ed., n. 2, p. 345].

¹⁰ Against donee: Y. B. 14 Hen. VIII, fol. 4, pl. 5; against purchaser with notice: Y. B. 55 Ed. IV (Mich.) 7; against creditor: *Ex parte Chion*, 3 P. Wms. 187, n. (A); against devisee: Marlow v. Smith, 2 P. Wms. 201. See also LEWIN, TRUSTS, 12 ed., pp. 275, 276; MAITLAND, EQUITY, pp. 117, 118.

¹¹ In the case of *disseisin* the courts first drew a distinction. It was said that the *disseisor* of the trustee was in by the *post* and not by the *per*, and so took free from any obligation. Earl of Worcester v. Finch, 4 Inst. 85. See Chudleigh's Case, 1 Rep. 120 a, 130 b; LEWIN, TRUSTS, 12 ed., 280. But that doctrine now seems to have been repudiated. *In re Nesbitt and Potts' Contract*, [1905] 1 Ch. 391; *aff'd* in Court of Appeals, [1906] 1 Ch. 386. See also MAITLAND, EQUITY, pp. 121, 170.

¹² NOTE 4, *supra*.

¹³ See LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION, 6; MAITLAND, EQUITY, 122 *et seq.*; Hart, "The Place of Trust in Jurisprudence," 28 LAW QUART. REV. 290.

¹⁴ See SALMOND, JURISPRUDENCE, 3 ed., 208.

¹⁵ Case of Market Overt, 5 Co. R. 83 b.

¹⁶ Money: Higgs v. Holiday, Cro. Eliz. 746; bank-note: Miller v. Race, 1 Burr. 452; promissory note: Grant v. Vaughan, 3 Burr. 1516; bill of exchange: Peacock v. Rhodes, Doug. 632.

¹⁷ Odd-Fellows' Savings Bank v. Banton, 46 Cal. 603; O'Brien v. Fleckenstein, 180 N. Y. 350, 73 N. E. 30.

¹⁸ See WILLISTON, SALES, § 319; MECHEM, SALES, § 168.

¹⁹ See WILLISTON, SALES, § 352 *et seq.*; MECHEM, SALES, §§ 167, 981. A number

actions and acquisitions. Therefore the law has given the vendor in market overt, or the thief or finder of a promissory note, the power to pass a title which he himself does not possess. So in the case of trusts, in order to secure acquisitions of property equity concedes to the holder of the legal title, who stands before the world as owner, the power to clothe a purchaser for value without notice with a complete title.²⁰ Where is the anomaly in saying that *cestui's* rights are *in rem*? No doubt the *cestui* has a personal right against the trustee that he perform the trust in accordance with its terms, but it is submitted that primarily he has a real right in the *res* itself.²¹

This conception seems not only analytically sound but carries with it very salutary practical results. Under this view the many English and American cases²² which prefer the *cestui* under a trust of an equitable interest (the legal estate being outstanding) to an assignee of the trustee for value and without notice are explainable, for the trustee then had nothing to assign; while if the *cestui's* right is merely *in personam* the assignee, having acquired the trustee's title for value without notice, should be protected.²³ Moreover, to work out the *cestui's* right to the *res* on the *in personam* doctrine where he is allowed to follow the *res* into the hands of successive holders either with notice or for no consideration is complicated and involved, while if the *cestui* is considered the real owner in equity the result is simple enough. He has an actual estate which can only be cut off by a sale to a *bonâ fide* purchaser. Simplicity of thought is always conducive to sound reasoning, and therefore much to be preferred to an over-refined theory full of difficulties which, although not insurmountable, are very misleading and often open the door to possible error.²⁴

of the above instances are statutory. But that fact seems immaterial, for a statutory rule is no less a part of the legal system than a rule of the common law.

²⁰ Maitland distinguishes the case of a sale in market overt, etc., from that by a trustee, on the ground that in the former case the purchaser acquires an original title, while in the latter, a derivative title which equity will not take away. MAITLAND, *EQUITY*, 143. But the distinction seems formal only, for in either case it is a question of establishing an indefeasible title to secure the acquisition of property. The manner of creating that title seems immaterial.

²¹ Nor is there any inherent difficulty in this twofold conception. A contract in the same way creates a personal obligation and a right *in rem*, — a right against the obligor specifically, and a right against everyone generally that the relationship shall not be disturbed.

For a further exposition of the theory that the *cestui's* right is *in rem* rather than *in personam*, see HUSTON, *THE ENFORCEMENT OF DECREES IN EQUITY* (Harvard Univ. Press, 1915, — in press), and Professor Pound's Review of WILLOUGHBY, *THE LEGAL ESTATE*, in 26 HARV. L. REV. 462.

²² *Cave v. McKenzie*, 46 L. J. Ch. 564; *Cave v. Cave*, *supra*; *Cory v. Eyre*, *supra*; *Shropshire Rwy., etc. Co. v. The Queen*, *supra*; *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263; *In re Vernon, Ewens & Co.*, 33 Ch. D. 402; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Downer v. South Royalton Bank*, 39 Vt. 25.

²³ See Professor Ames' article, "Purchase for Value without Notice," in 1 HARV. L. REV. 1, at pp. 11 and 12.

²⁴ A conspicuous example of the error into which some courts have fallen in attempting to follow out the *in personam* view to its logical conclusion is the case of *Willson v. Louisville Trust Co.*, 102 Ky. 522, 44 S. W. 121. The trustee of an infant *cestui*, having wrongfully conveyed the *res* to another, allowed the Statute of Limitations to run against his right to recover the *res*. The court held that the *cestui*, having to work out his rights through the trustee, was barred because the trustee was barred, although

RECOVERY FOR INDIRECT INJURY CAUSED BY ACTION ON A THIRD PERSON. — Although sometimes disputed and frequently ignored,¹ it is a fundamental principle of the law of torts that intentional harm, unless justified, is actionable.² The failure clearly to recognize this principle apparently accounts for some confusion of reasoning in a recent case, in which a wife was denied recovery for loss of her husband's *consortium* and support against a defendant who first induced the husband to commit a crime, and then secured his conviction. *Nieberg v. Cohen*, 92 Atl. 214 (Vt.).³ The court implies that it would have allowed recovery if there had been "intent to injure the wife," by which it apparently means if the act had been inspired by hostility to the wife. A few cases may support this distinction,⁴ but it seems unsound and apparently arises from a confusion of motive and intent.⁵ Harm is no less intentional when the tortfeasor merely knows that it will result from his act, than when his motive also is to inflict the harm.⁶ But motive is an important factor in determining whether or not there is justification; or better, a bad motive may avoid an otherwise sufficient justification.⁷ It is submitted, however, that if the act is a legal wrong to the third person, there can never be justification as to the plaintiff, and facts showing justification and motive are alike immaterial.⁸ But where the act is not a wrong to

as to the *cestui* the statute had not begun to run. Such a result is a powerful argument against the doctrine for which it stands.

¹ *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492; *Bourlier Bros. v. Macauley*, 91 Ky. 135, 15 S. W. 60; *Ashley v. Dixon*, 48 N. Y. 430. A failure to grasp this principle is evident in the opinions of Lord Watson and Lord Herschell in *Allen v. Flood*, [1898] A. C. 1, 96, 118. See also the dissenting opinions in *Lumley v. Gye*, 2 E. & B. 216, 246; and *Bowen v. Hall*, 6 Q. B. D. 333, 342.

² *Walker v. Cronin*, 107 Mass. 555; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817; *Hughes v. McDonough*, 43 N. J. L. 459; *Angle v. Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1; *Tarleton v. McGawley*, Peake N. P. Cases, 205; *Quinn v. Leatham*, [1901] A. C. 495, 510; *South Wales Miners' Federation v. Glamorgan Coal Co., Ltd.*, [1905] A. C. 239. See also *Bowen v. Hall*, *supra*, 337; *Vegelahn v. Guntner*, 167 Mass. 92, 105, 44 N. E. 1077, 1080.

³ A more complete statement of the facts of this case appears in RECENT CASES, p. 530. At common law a wife could not sue for loss of *consortium*, but under modern statutes enabling a married woman to sue in her own name, there seems no reason for refusing such an action, and ordinary general tort principles should apply. *Flandermeyer v. Cooper*, 85 Oh. St. 327, 98 N. E. 102. For a discussion of this question see 26 HARV. L. REV. 74.

⁴ See *McNary v. Chamberlain*, 34 Conn. 384; *Gregory v. Brooks*, 35 Conn. 437; *McCann v. Wolff*, 28 Mo. App. 447; *Jones v. Stanly*, 76 N. C. 355.

⁵ This confusion arises largely from the continual use of the word "malice" with every shade of meaning from intent to the worst kind of evil motive.

⁶ This proposition must not be confused with the unsound but common statement that "every person is presumed to intend the reasonable consequences of his own act."

⁷ An analogy to libel and slander is suggested. Justification, which may be the mere exercise of a legal right or competition, is analogous to privilege, and as malice avoids the privilege, so bad motive may avoid the justification. For a discussion of what may constitute justification, see *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25.

⁸ The following example may explain the suggested distinction. If the defendant persuades a third party to refrain from entering into a contract with the plaintiff, competition may justify the injury to the plaintiff. But if, under the same conditions of competition, the defendant prevents the third party from entering into the contract by falsely imprisoning him, he should not be justified. This distinction is not expressly laid down in the cases, but it is submitted that it is sound and in accord with the decisions.

the third person,⁹ then the injury to the plaintiff may be justified, and evidence of such justification and of motive are material.¹⁰ Applying these principles to the present case, it appears that the important question to determine is whether the criminal conviction of the husband is sufficient justification for the injury to the plaintiff. This the court fails to discuss, although the result which it reaches seems correct.¹¹

A somewhat different situation exists where the injury to the plaintiff is not intentional but might reasonably have been foreseen. Justification aside,¹² it would seem to make no difference in this class of cases whether the act to the third person be intentional or negligent. In this connection another recent case is interesting, which allowed recovery for loss by fire from a defendant who negligently ran over a fire company's hose and so prevented them from extinguishing the fire. *Birmingham, E. & B. R. Co. v. Williams*, 66 So. 653 (Ala.).¹³ It is to be noticed that in this case the ultimate injury is to specific property and not to the plaintiff in his business relations. In the latter class of cases recovery is apparently not allowed.¹⁴ Although difficult to support in theory, such a distinction is not difficult of explanation. Because of the historical importance of the old idea of trespass, the law has continued to be more ready to protect person and property from interference than the less definite but equally valuable rights arising from relations with others. This tendency has been strengthened by a dread of greatly increasing litigation and a distrust of the competency of juries to deal with questions involved.¹⁵ But since all courts now allow recovery for intentional injuries to pecuniary substance,¹⁶ it does not seem justifiable to revive the historical distinction in these cases where there is a negligent

⁹ As persuading the third person to break a contract.

¹⁰ See an article by Dean Ames in 18 HARV. L. REV. 411. Mere good motive is not of itself a justification, however. See *South Wales Miners' Federation v. Glamorgan Coal Co., Ltd.*, *supra*, where recovery was allowed for inducing a breach of contract, although the motive was indirectly to benefit the plaintiff employers.

¹¹ There would seem to be sufficient justification, and since there is no bad motive towards the plaintiff, there should be no recovery. But whether or not all the defendant's acts were covered by the justification is a question of fact, which requires a more thorough knowledge of the evidence for determination.

¹² The same principles as to justification should apply in these cases, as where the harm to the plaintiff is intentional. Therefore, where there is an intentional or negligent wrong to the third person, justification as to the plaintiff should not be possible. But where the act to the third person is lawful, a sufficient justification for an intentional injury to the plaintiff would *a fortiori* be sufficient for a negligent injury.

¹³ The facts of this case are more completely stated in RECENT CASES, p. 525.

The following cases are nearly identical in their facts: *Accord*, *Tutwiler Coal, Coke & Iron Co. v. Nail*, 141 Ala. 374, 37 So. 634; *Houren v. Chicago, M. & St. P. Ry. Co.*, 236 Ill. 620, 86 N. E. 611; *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133, 86 S. W. 997; *Metallic Compression Casting Co. v. Fitchburg, R. Co.*, 109 Mass. 277. *Contra*, *Mott v. Hudson River R. Co.*, 1 Robt. (N. Y.) 585. The fact that in these cases the injury at first glance seems direct, and not through interference with the action of third persons, the fire company, may explain why the courts have so readily allowed recovery.

¹⁴ *Connecticut Mutual Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265; *Byrd v. English*, 117 Ga. 191, 43 S. E. 419; *Anthony v. Slaid*, 11 Metc. (Mass.) 290; *Davis v. Condit*, 124 Minn. 365, 144 N. W. 1089; *Dale v. Grant*, 34 N. J. L. 142. But see *Cue v. Breeland*, 78 Miss. 864, 29 So. 850.

¹⁵ See an article by Professor Pound in 28 HARV. L. REV. 343, 355.

¹⁶ *Walker v. Cronin*, *supra*; *Quinn v. Leathem*, *supra*.

injury through action on a third person. A further possible line of distinction is between the cases where the injury to the plaintiff is intentional, and where it is only negligent. Broadly speaking, this is apparently the line which limits liability under the present state of the law. To allow recovery for an injury intentionally caused, but not for the same injury negligently caused, is not unheard of in our law.¹⁷ An example is the refusal of some courts to allow recovery for injury caused by mental shock negligently inflicted by the defendant.¹⁸ Here again there is no logical basis for the distinction, but the courts are influenced by the policy against multiplicity of litigation and the practical difficulties of procedure. But this produces the unfortunate result of allowing undoubted injuries to go without redress.¹⁹

It would seem to be a far better rule to allow recovery for all unjustified injuries caused by influencing the action of a third party, whether intentional or only the natural and probable result of an intentional or negligent act. The fact that occasional cases do allow recovery for such indirect injury to property indicates that here as in other parts of the law the modern tendency is towards a broadening of tort liability.²⁰ The suggested rule does not in any way increase the duty imposed on a person in respect to his actions. Every person now must act with reasonable prudence, and no increase in the degree of prudence required, nor in the kind of action in which one must exercise prudence is involved. It only imposes liability for an additional kind of injury, which is not new but which is recognized as actionable by the law in other circumstances. This does not seem to be too great a liability to impose upon the defendant, and it is certainly more just that he should be compelled to pay for the reasonably foreseeable injury which he has caused, than that the injured party should bear the loss.

RECENT CASES

ANIMALS — DAMAGE TO PERSONS BY ANIMALS — INJURY TO YOUNG CHILD IN CONSEQUENCE OF NEGLIGENCE OF CUSTODIAN. — The plaintiff, a child three years old, negligently attended by her grandfather, put her arm through the bars of a cage at the defendant's zoölogical garden, and was bitten by a "wild ass of Asia" confined therein. There was no proof that the defendant was negligent or that it had knowledge of the vicious propensity of the animal.

¹⁷ For instance, the action of deceit, although there is no liability for negligent language.

¹⁸ Recovery is allowed where the shock is intentional. *Wilkinson v. Downton*, [1897] 2 Q. B. 57. But it is not allowed everywhere where the act is negligent and there is no physical impact. *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88.

¹⁹ This will be true in all cases where the act of the third party is lawful, or where, being under no duty to act, he refrains from acting.

²⁰ An instance of this is the right of privacy. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68. Also the suggested liability for negligent language, which has been adopted in New Hampshire. See an article by Professor Jeremiah Smith in 14 HARV. L. REV. 184; *Cunningham v. Pease House Furnishing Co.*, 74 N. H. 435, 69 Atl. 120.

Held, that the plaintiff cannot recover. *Jones v. Zoölogical Society of Philadelphia*, 71 Leg. Intell. 757 (Com. Pleas, Phila. Co., Pa.).

The court apparently considered the wild Asiatic ass not inherently dangerous. It would probably be held otherwise in most jurisdictions, for the animal closely resembles the zebra, which is treated as dangerous. *Marlor v. Ball*, 16 T. L. R. 239. See 2 NEW INTERNAT. ENCYC. 111. *Scienter* or negligence would then be unnecessary. Some of the authorities suggest, however, that in any case the defendant's only duty is to keep the animal "secure." See *Marlor v. Ball*, *supra*, 240. But the generally accepted view is that the owner is bound at peril to keep it from doing injury. See *Vredenburg v. Behan*, 33 La. Ann. 627; SALMOND, TORTS, 3 ed., § 126. This agrees with the common expressions that the "gist of the action" or the "negligence" consists in keeping the animal with notice, actual or presumed, of his vice. See *Lynch v. McNally*, 73 N. Y. 347; *Marble v. Ross*, 124 Mass. 44; *Smith v. Pelah*, 2 Str. 1264; *Hammond v. Melton*, 42 Ill. App. 186. It is further illustrated by the rule that a good declaration need allege only keeping, vice, injury, and, in a proper case, *scienter*. *May v. Burdett*, 9 Q. B. 101; *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. And the fact that recovery has been had repeatedly where the animal was chained or caged seems conclusive against the contention that the defendant in the principal case had performed its full duty. *Besozzi v. Harris*, 1 F. & F. 92; *Laverone v. Mangianti*, 41 Cal. 138; *Wyatt v. Rosherville Gardens Co.*, 2 T. L. R. 282; *Sarch v. Blackburn*, 4 C. & P. 297. Very often, in such cases, the plaintiff will lose because of his own fault in causing the injury. *Marlor v. Ball*, *supra*. But the plaintiff here was too young to be responsible for bringing the injury on herself. *Meibus v. Dodge*, 38 Wis. 300; *Plumley v. Birge*, 124 Mass. 57; *Linck v. Scheffel*, 32 Ill. App. 17. And the negligence of the grandfather should not prevent recovery by the child even on the theory of imputed negligence, unless the grandfather may be said to be the agent of the parent, the real beneficiary. See 23 HARV. L. REV. 299.

BANKRUPTCY — FRAUDULENT CONVEYANCES — INSURANCE ON PROPERTY FRAUDULENTLY CONVEYED. — The bankrupt conveyed property without consideration to the defendant, for the purpose of defrauding creditors. The defendant effected insurance on the property, and on the destruction of the property after bankruptcy proceedings had begun, collected the proceeds, which the trustee now claims. *Held*, that the trustee cannot recover. *Trenholm v. Klinker*, 66 So. 738 (Miss.).

Insurance is not a substitute for the property insured, but the product of a contract of indemnity. Accordingly when property fraudulently conveyed is destroyed, the insurance cannot be recovered by the trustee in bankruptcy as an altered form of the property. *Bernheim v. Beers*, 56 Miss. 149. So if the grantee effects the insurance, the trustee is powerless. If, however, the bankrupt has paid the premiums, the insurance may be a fraudulent conveyance in itself, and the proceeds will then be recoverable by the trustee. *Lerow v. Wilmarth*, 9 Allen (Mass.) 382. See 26 HARV. L. REV. 362. In the principal case there is a hint of a secret trust for the grantor. In such a case, if the grantee insured for his undisclosed *cestui*, or if he purported to, and the *cestui* ratified, the *cestui*, or his trustee in bankruptcy, should of course be able to recover on principles of agency. *Lerow v. Wilmarth*, *supra*.

BANKRUPTCY — FRAUDULENT CONVEYANCES — VOLUNTARY SETTLEMENTS UNDER ENGLISH BANKRUPTCY STATUTE. — A bankrupt, within two years of bankruptcy, purchased a clock, and caused it to be affixed to a hotel of which his nephew was about to become lessee. In consideration of this being considered part of the freehold, the landlord agreed to reduce the agreed yearly rental for the nephew. *Held*, that the trustee cannot recover from the nephew. *In re Branson*, [1914] 3 K. B. 1086 (C. A.).

The English bankruptcy statute provides that any settlement of property, not made in favor of a *bonâ fide* purchaser, shall, if the settlor becomes bankrupt within two years, be void as against the trustee in bankruptcy. 46 & 47 VICT., c. 52, § 47. By subsection 3, a "settlement" is defined to include any conveyance or transfer. The transfer to the landlord was for value and in good faith, and clearly cannot be upset. *In re Carter & Kenderdine's Contract*, [1897] 1 Ch. 776. But it inured to the sole benefit of the nephew, and as a volunteer he would seem to be within the provisions of the statute, and bound to disgorge. The English courts, however, hold that the word "settlement" covers only those gifts where it was intended that the donee should retain the subject matter more or less permanently. *In re Plummer*, [1900] 2 Q. B. 790. Since the property never passed to the donee, the principal case may be supported on this very technical construction. See *In re Harrison*, [1900] 2 Q. B. 710. If the other requisites for a fraudulent conveyance were present, however, the result would probably have been different in our courts. See *Merchants' & Miners' Transportation Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 272; 25 AM. L. REV. 185, 196.

BANKRUPTCY — PARTNERSHIP CASES — EFFECT OF DISCHARGE OF FIRM ON LIABILITY OF NON-BANKRUPT PARTNERS. — A bankrupt partnership offered a composition whose terms provided for the release of the members from individual liability on firm debts. As the partners were not personally bankrupt and their private estates were not being administered, the bankruptcy court required that this condition be omitted. After accepting the amended composition, the creditors sue the individual partners in the state court. *Held*, that the actions will be enjoined, on the ground that the composition in bankruptcy discharged the partners as well as the firm. *Abbott v. Anderson*, 106 N. E. 782 (Ill.).

In reaching this conclusion the court relies upon the principle, established since the confirmation of the composition, that the estates of non-bankrupt partners may be administered in the firm bankruptcy for the purpose of paying firm debts. *Francis v. McNeal*, 228 U. S. 695. The precise result, moreover, finds support in the language of the Supreme Court. See *Francis v. McNeal*, *supra*, 701. It must be admitted, however, that a consistent application of the entity theory of partnership, recognized certainly to some extent by the Bankruptcy Act of 1898, would demand the contrary result in both cases. **BANKRUPTCY ACT OF 1898, § 1 a (19); § 5 a, c, h.** On this ground previous authorities had held that a discharge of the firm did not discharge the partners. *Strause v. Hooper*, 105 Fed. 590; *In re Hale*, 107 Fed. 432. See 1 LOVELAND, **BANKRUPTCY**, § 278. Some courts had also declined to administer individual assets on the bankruptcy of the firm alone. *In re Bertenshaw*, 157 Fed. 363. See 27 HARV. L. REV. 175. It was clearly established, furthermore, that the firm could be bankrupt although the members were not. *Dickas v. Barnes*, 140 Fed. 849; *In re Pincus*, 147 Fed. 621. But *cf. Vaccaro v. Security Bank of Memphis*, 103 Fed. 436, 442. To carry the entity theory through successfully, however, it would be essential that some obligation to contribute to the payment of the firm debts run to a bankrupt firm from its members, for otherwise bankruptcy proceedings against the firm seem rather fruitless. See *In re Forbes*, 128 Fed. 137, 139; 20 HARV. L. REV. 589, 603. But neither the common law nor the Bankruptcy Act furnishes any basis for such a liability. See *Francis v. McNeal*, *supra*, 699. But *cf.* 18 HARV. L. REV. 495, 500. Accordingly, however objectionable the combined result of the principal case and *Francis v. McNeal* may be from the point of view of the entity theory or of logic, it nevertheless accomplishes justice and is not wholly unfortunate. For it avoids the futility of discharging only a shadowy partnership entity and yet relieves the partners from liability only after using their individual estates in payment of the firm creditors. On the facts of this particular case, it is true, the hard-

ship to the creditors was severe. But it was unavoidable, for the court was bound to give effect to the discharge in the light of the law as it had been determined since the decision of the bankruptcy court.

BANKRUPTCY — STATE BANKRUPTCY AND INSOLVENCY LAWS — EFFECT OF GENERAL ASSIGNMENT UNDER STATE LAWS. — A state statute provided that a general assignment should dissolve prior attachments and should entitle the debtor to a discharge on certain conditions. After an attachment, the debtor made a general assignment, and within four months thereafter, but more than four months after the attachment, a petition in bankruptcy was filed against him. *Held*, that the attachment is valid. *Pelton v. Sheridan*, 144 Pac. 410 (Ore.).

The National Bankruptcy Act is the supreme law of the land, and suspends state statutes which encroach upon its domain. *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 51 N. E. 529. See *Tua v. Carriere*, 117 U. S. 201. Accordingly, the provision for discharge in the statute in the principal case is clearly objectionable, and the court holds it such an integral part of the statute that the whole must fall. The assignment was, therefore, absolutely void, and left the attachment untouched. It has been held, however, that a general assignment under a similar statute may still be good as a common-law assignment. *Boese v. King*, 108 U. S. 379. Regardless of the wisdom of this doctrine, it is clear that even this decision does not give the assignment more than its common-law effect, so that all peculiar statutory incidents are inoperative and the prior attachment would not be dissolved. *Boese v. King*, *supra*. Some states, however, have mistakenly held that the assignment takes effect under the statute, and is only nullified by proceedings in bankruptcy, so that the attachment lien, being once dissolved, cannot be revived. *Binder v. McDonald*, 106 Wis. 332, 82 N. W. 156. The statute in the principal case might perhaps be held to trench upon the national act by reason alone of its provision for dissolving attachments. For it may be said that the national act requires by necessary implication that all liens older than four months shall stand, and that a state law which gives to general assignments the effect of avoiding prior attachments conflicts with the federal law. See *Tua v. Carriere*, *supra*. Cf. *Ebersole v. Adams*, 10 Bush (Ky.) 1873; *Binder v. McDonald*, *supra*.

CARRIERS — DISCRIMINATION AND OVERCHARGE — MISTAKE: LIABILITY FOR QUOTING PUBLISHED RATE NO LONGER APPLICABLE BECAUSE OF CHANGE IN NAME OF STATION. — The defendant railroad had filed with the Interstate Commerce Commission through tariffs on cement, naming \$1.85 and \$2.25 per ton as the rates, respectively, to Bradford and Niantic. Bradford station was then renamed Melville station, and Niantic station was renamed Bradford station; but the changes were not indicated in the schedules published or on file. More than a year later a shipper consigned cement to the new Bradford station, relying on the published schedules which indicated a rate of \$1.85 to "Bradford." The carrier collected the freight at \$2.25 from the consignee, who was reimbursed by the shipper. *Held*, that the shipper can recover the difference from the railroad. *Charles Warner Co. v. Delaware, L. & W. R. Co.*, 32 I. C. C. 244.

Under the federal laws, any deviation from tariffs published and filed with the Interstate Commerce Commission is forbidden. 34 STAT. AT LARGE, 586. So stringent is the prohibition that, where shipments have been made in reliance on tariffs negligently misquoted by a freight agent, the shipper is denied recovery in an action for such negligence, since recovery would indirectly violate the statute. *Illinois Central R. Co. v. Henderson Elevator Co.*, 226 U. S. 441; *Poor v. Chicago, B. & Q. Ry. Co.*, 12 I. C. C. 418. See 27 HARV. L. REV. 177. A recent Missouri case adopts this view. *Sloop v. Delano*, 170 S. W. 385 (Mo.

App.). A contrary decision in South Carolina cannot be supported, in view of federal decisions in a field in which the federal law is supreme. *Driggs v. Southern Ry. Co.*, 81 S. E. 431. Cf. *Gulf, C. & S. F. Ry. Co. v. Hesley*, 158 U. S. 98. It is submitted that in the principal case also recovery should have been denied. Existing tariffs can be changed, under the statute, only by filing new schedules with the Commission. The scheduled rate to Bradford appeared to be \$1.85. But the lawful rate to the place of consignment was still \$2.25, though the name of the station had been changed, and its old name given to a station enjoying lower rates. The conclusion seems inevitable that the decision in substance compels the railroad to charge the complainant less than the lawful rate, in violation of the statute.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — RIGHT OF CONSIGNOR TO SUE. — Lumber was sold and consigned to the purchaser. Title passed upon shipment, but, owing to the carrier's failure to transport by the stipulated route, the consignee refused to receive the goods. The consignor sues the carrier upon the contract of shipment. By statute all actions must be maintained by the real party in interest. *Held*, that the plaintiff cannot recover. *Warren & O. V. Ry. Co. v. Southern Lumber Co.*, 170 S. W. 998 (Ark.).

The weight of authority apparently holds that the consignor, as party to the contract of shipment, may sue thereon without showing any interest in the goods. *Blanchard v. Page*, 8 Gray (Mass.) 281; *Finn v. Western R. Co.*, 112 Mass. 524; *Carter v. Southern Ry. Co.*, 111 Ga. 38, 36 S. E. 308; *Dunlop v. Lambert*, 6 Cl. & F. 600. Not being the owner, however, he cannot sue in tort. *Wetzel v. Power*, 5 Mont. 214. See *Dawes v. Peck*, 8 T. R. 330. The consignee, also, if title has passed, may sue the carrier in contract in his own name upon the theory that the consignor contracted as his agent, or in tort for breach of duty. *Bank of Irvin v. American Express Co.*, 127 Ia. 1, 102 N. W. 107; *Dyer v. Great Northern Ry. Co.*, 51 Minn. 345, 53 N. W. 714. Some authorities, however, support the instant case in holding that the consignee alone can sue if the legal title is in him. *Union Pacific R. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961; *Blum v. Caddo*, 1 Woods (U. S.) 64. See *Dawes v. Peck*, *supra*. But the statutory requirement that actions be brought in the name of the real party in interest is not generally held to preclude suit by the consignor, even though title be in the consignee. *Hooper v. Chicago & N. W. Ry. Co.*, 27 Wis. 81; *Southern Express Co. v. Craft*, 49 Miss. 480. *Contra*, *Union Pacific R. Co. v. Metcalf*, *supra*. It is submitted that the preferable view allows the consignor to recover. In the first place, it obviates the troublesome question of locating title, and thus conduces to simplicity. There is no hardship on the carrier, for recovery by the consignor bars an action by the owner. See *Carter v. Southern Ry. Co.*, *supra*. And the consignor is forced to hold the proceeds for the party actually entitled. See *Finn v. Western R. Co.*, *supra*. Then, too, since the consignor is primarily liable for freight, the carrier should be subject to a corresponding liability to him on the contract. See *Central R. Co. of N. J. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575; *Portland Flouring Mills Co. v. British & F. M. Ins. Co.*, 130 Fed. 860.

CARRIERS — LIMITATION OF LIABILITY — EFFECT OF NOTICE FILED WITH PUBLIC SERVICE COMMISSION. — The plaintiff checked her baggage on an intra-state journey without declaring its value. The defendant carrier had filed a notice with the Public Service Commission limiting its liability for baggage, in accordance with a state statute which provided that every carrier should be liable for the full value of baggage, but that value in excess of one hundred and fifty dollars should be declared, and excess charges paid. N. Y. CONSOL. LAWS, PUBLIC SERVICE LAW, § 38. The plaintiff had no knowledge of this regulation or of a similar limitation printed on the baggage check. *Held*, that the plain-

tiff may recover the full value. *Dazey v. New York Central & H. R. R. Co.*, 150 N. Y. Supp. 58 (Sup. Ct.).

The court construes the statute as declaratory of the common law, which holds the carrier to full liability in the absence of an estoppel against the shipper owing to express agreement or valuation. *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212. Filing the regulation with the commission seems properly held not to carry constructive notice of the limitation to the shipper. An opposite conclusion, however, has been reached as to shipments under the Interstate Commerce Act. *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, criticised in 27 HARV. L. REV. 737. It is to be regretted that so desirable a rule as that of the principal case should have been thus restricted in operation.

CONFLICT OF LAWS — OBLIGATIONS *EX DELICTO*: CREATION AND ENFORCEMENT — ACTION BY PERSONAL REPRESENTATIVE FOR TORT COMMITTED UNDER FOREIGN STATUTE WHICH VESTED THE RIGHT IN BENEFICIARIES. — The Pennsylvania death statute gave an action to the widow of the deceased, but if no widow, to his personal representative, the damages to go to the widow and children. In default of such relatives it vested the action in the parents of the deceased. The New York statute created a similar right, but provided that the suit be brought in all cases by the deceased's personal representative. Two servants of the defendant were wrongfully killed in Pennsylvania. Suits were brought in New York by their personal representatives, in the one case for the benefit of the wife and child, in the second for that of the parents. *Held*, that recovery be allowed in the first case, and refused in the second. *Teti v. Consolidated Coal Co.*, 217 Fed. 443 (N. D., N. Y.).

When a statutory tort is committed in a foreign jurisdiction, the statute of that sovereign creates the right of action. *Usher v. West Jersey R. Co.*, 126 Pa. St. 206, 17 Atl. 597; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534. It may therefore limit the extent of the right and determine to whom the cause of action shall be given. *Stone v. Groton, etc. Co.*, 77 Hun (N. Y.) 99, 28 N. Y. Supp. 446. See 18 HARV. L. REV. 220. Some courts have held, however, that where there is an analogous statute in the state where suit is brought, allowing some other person to sue than the one designated by the *lex loci delicti*, the former may sue. *Stewart v. Baltimore & Ohio R. Co.*, 168 U. S. 445. These cases are limited on their facts to situations where the two statutes designate the same persons to take the money ultimately, but give the cause of action itself to different representatives. It is said that the court will look at the substance of the matter rather than the form, and will not be influenced by a difference in the formal parties plaintiff. See *Strait v. Yazoo & M. V. R. Co.*, 209 Fed. 157. The principal case adopts this distinction, and accordingly allows recovery in the first case, but reaches the contrary result in the second, where the cause of action vested in the parents for their own benefit and not in a representative capacity. While this classification reconciles the conflicting cases there seems little to be said for it on theory. For if "justice" can be supposed to require the entertainment of a suit brought by a person who has no cause of action under the statute, there would seem to be no logic in confining the operation of this over liberal rule to the one class of cases.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT: STATUTE FORBIDDING EXACTION OF AN AGREEMENT NOT TO BELONG TO LABOR UNION AS CONDITION OF EMPLOYMENT. — A statute prohibited employers from requiring of laborers an agreement not to belong to a labor union, as a condition of either securing or continuing in a job. KANSAS SESSION LAWS OF 1903, c. 222; GEN. STAT. KANSAS, 1909, §§ 4674, 4675. *Held*, that the

statute is obnoxious to the Fourteenth Amendment. *Coppage v. Kansas*, 236 U. S. 1.

For a discussion of this case, in connection with the general problem of liberty of contract under the Constitution, see NOTES, p. 496.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT: STATUTE REQUIRING CORPORATIONS TO GIVE TRUE REASON FOR DISCHARGING EMPLOYEES. — A statute required every corporation to give a discharged employee a true statement of the reason for dismissal, within ten days after application therefor. *Held*, that the statute is obnoxious to the Fourteenth Amendment. *St. Louis S. W. Ry. Co. v. Griffin*, 171 S. W. 703 (Tex.).

For a discussion of the right to restrict liberty of contract, see NOTES, p. 496.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT: STATUTE REQUIRING EMPLOYERS TO GIVE EMPLOYEES ONE DAY OF REST IN SEVEN. — A statute required manufacturing and mercantile establishments to give their employees twenty-four consecutive hours of rest in every seven days. NEW YORK LABOR LAW, Art. 6, § 8 *a*; CONSOLIDATED LAWS, c. 31 (LAWS OF 1909, c. 36), as amended LAWS OF 1913, c. 740; PENAL LAW, § 1275. *Held*, that the statute is not a deprivation of liberty without due process of law. *People v. C. Klinck Packing Co.*, 52 N. Y. L. J. 1925 (Ct. App.).

For a discussion of this case, in connection with the general problem of liberty of contract under the Constitution, see NOTES, p. 496.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT: STATUTES RESTRICTING EMPLOYMENT OF ALIENS. — A statute required municipal corporations to employ on public works only United States citizens. NEW YORK LABOR LAW, Art. 2, § 14; LAWS OF 1909, c. 36. *Held*, that the statute deprives aliens of their rights under the Fourteenth Amendment. *People v. Crane*, 52 N. Y. L. J. 1408 (N. Y. App. Div.).

An Arizona statute forbade any employer to hire more than a certain percentage of aliens. *Held*, that the statute is unconstitutional. *Raich v. Attorney-General* (not yet reported). Decided by the U. S. Dist. Ct., Dist. of Arizona, early in January, 1915).

For a discussion of these cases, in connection with the general problem of liberty of contract under the Constitution, see NOTES, p. 496.

CORPORATIONS — CHARTERS — REFORMATION OF CHARTER FOR MISTAKE OF INCORPORATORS. — Articles of incorporation, filed in compliance with a general law, by mistake of the incorporators failed to include a qualification on the clause restricting the right to dispose of stock. *Held*, that equity has no jurisdiction to reform the articles. *Casper v. Kalt-Zimmers Mfg. Co.*, 149 N. W. 754 (Wis.).

At common law the creation of corporations is the prerogative of the sovereign, exercised, under the constitutional theory of division of powers, by the legislature. See *Spotswood v. Morris*, 12 Ida., 360, 383, 85 Pac. 1094, 1101; *People v. Coleman*, 59 Hun (N. Y.) 624, 13 N. Y. Supp. 833. See *McKim v. Odom*, 3 Bland Ch. (Md.) 407, 417. The special grant of a corporate charter is therefore regarded as a legislative act. *Lee v. Bude & T. J. Ry. Co.*, L. R. 6 C. P. 576. The same theory has prevailed where the incorporation is under a general law. See *Lord v. Equitable Life Assur. Society*, 194 N. Y. 212, 238, 87 N. E. 443, 452. In substance, however, incorporation under a general law is consensual in nature. By passing such a law the sovereign seems to have entrusted his prerogative, to that extent, to the people, leaving them free to incorporate at their own volition. The act of filing the articles of incorporation in substance places on record the contract between the incorporators, and in

itself involves no peculiar legislative action. Accordingly there seems no compelling reason why the articles should not lie within equity's jurisdiction to reform. See *Cleghorn v. Zumwalt*, 83 Cal. 155. The exercise of a jurisdiction to reform for mistake in any given case would depend, of course, upon the degree to which strangers, who had relied upon the articles as filed, might be prejudiced. Nor would such control of corporate charters by equity be wholly exceptional, for it has long exercised similar supervision in disregarding the corporate fiction when necessary to avoid unconscionable use of the franchise. See *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 254.

CRIMINAL LAW — DEFENSES — PARTICIPATION TO DETECT CRIME. — The defendant had received money from X to make an illegal purchase of whisky from Y, and under promise of immunity given by a deputy sheriff, in order to acquire evidence against Y, made the purchase, and delivered the whisky to X. The defendant was then indicted under a statute making it a crime to act as agent of the buyer in an unlawful sale of intoxicating liquor. *Held*, that a conviction is proper. *Branley v. State*, 65 So. 512 (Miss.).

A detective who coöperates with a criminal for the purpose of getting evidence against him cannot be guilty of an offense for which an *animus furandi* is required. *Price v. People*, 109 Ill. 109. See *Commonwealth v. Hollister*, 157 Pa. 13, 27 Atl. 386. Even where this element is not essential, although *mens rea* is clear from the detective's intentional participation in the criminal act, he will be protected. See *Carroll v. Commonwealth*, 84 Pa. St. 107; *Wright v. State*, 7 Tex. Cr. App. 574. This immunity has been carried to the dangerous extent of protecting the detective where, had he not been acting in that capacity, he would have been independently guilty of the offense he was endeavoring to detect. *Regina v. Bannen*, 2 Moody C. C. 309; *State v. Torphy*, 78 Mo. App. 206. But see *Dever v. State*, 37 Tex. Cr. App. 396, 30 S. W. 1071. The principal case is clearly right in not extending the immunity to the commission of a crime quite distinct from that committed by the criminal. The proper test, however, would seem to be not whether the crime committed was a separate offense, but rather, whether the detective's crime be one for which he could be held independently, though the criminal had never gone forward and completed the offense. Any other principle would give immunity to the commission of murder as a means of detecting a murderer.

EASEMENTS — NATURE AND CLASSES OF EASEMENTS — RIGHT TO AN UNOBSTRUCTED VIEW OF THE PREMISES FROM THE HIGHWAY. — A's building projected into the highway eighteen inches beyond B's, so that a portion of the side wall was exposed to view from the street. A was in the habit of using this wall for advertising purposes. B. set up signboards at right angles to the front of his building, extending from a point about eight inches from the ground upward for twenty-two feet, at about nine inches from the side wall of A's building, entirely obscuring the view of the wall from the street. In a suit by B. for damages from A's pasting bills over these boards, A. counterclaims, asking an injunction to restrain B. from obstructing the view of his wall. *Held*, that the injunction will be granted. *Cobb v. Saxby*, [1914] 3 K. B. 822.

For a discussion of the question whether this case necessitates a recognition of a "right of publicity," see NOTES, p. 499.

EVIDENCE — DOCUMENTS — AUTHENTICATION OF LETTERS NOT IN SENDER'S HANDWRITING. — In an action on an account, the plaintiff offered in evidence letters alleged to have been sent by the defendant, an illiterate. The plaintiff could not authenticate the letters by direct proof, but showed that they related to the account, and were consistent with facts as otherwise proved. Some of the letters purported to contain checks, and corresponding checks were pro-

duced. *Held*, that the letters are admissible. *Fayette Liquor Co. v. Jones*, 83 S. E. 726 (W. Va.).

Letters not received in due course of post in reply to previous communications must be authenticated in some other way, usually by proof that they are in the handwriting of the alleged sender, or of some one authorized by him. *Lingg v. State*, 28 Ind. App. 248, 61 N. E. 696; *Sweeney v. Ten Mile Oil & Gas Co.*, 130 Pa. St. 193, 18 Atl. 612. But it has been stated that the contents of a letter cannot be used to prove its genuineness. *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165. Exceptions have been made to this rule, however, in cases where the ordinary methods of authentication are unavailable. *In re Deep River National Bank*, 73 Conn. 341, 47 Atl. 675; *Hollister Bros. v. Bluthenthal*, 9 Ga. App. 171, 70 S. E. 970. See 3 WIGMORE, EVIDENCE, § 2148. Thus, in an early case, a letter sent by an illiterate was held to be authenticated by its contents. *Singleton v. Bremer*, Harp. (S. C.) 201, 209. Similarly, an unsigned typewritten letter was admitted, because it related to matters peculiarly within the knowledge of the alleged sender. *Commonwealth v. Drum*, 42 Pa. Super. Ct. 156. So, too, another court held that a letter was sufficiently authenticated by its reference to subjects previously discussed between the sender and the addressee. *People v. Adams*, 162 Mich. 371, 385, 127 N. W. 354, 360. Under circumstances where authentication by handwriting is impossible, the doctrine of these cases seems necessary and just, but it is properly restricted to cases where the internal evidence strongly negatives the possibility of fraud.

INFANTS — TORTS — LIABILITY FOR TORT ARISING IN CONNECTION WITH CONTRACT. — The defendant, an infant, hired a motor-car of the plaintiff to ride to a certain destination. During an intentional deviation, the car was injured without negligence on the defendant's part. The plaintiff sues in tort for conversion. *Held*, that he cannot recover. *Fawcett v. Smethhurst*, 31 T. L. R. 85 (K. B. Div.).

The general rule imposing liability on infants for their torts is subject to the ill-defined exception of "torts arising out of contract." *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574. Thus, in England an infant is not liable for deceit in inducing a contract. *R. Leslie, Ltd., v. Sheill*, [1914] 3 K. B. 607. In this country, however, there is vigorous protest against according such immunity. *Fitts v. Hall*, 9 N. H. 441; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420. *Contra*, *Slayton v. Barry*, *supra*. See WILLISTON, SALES, § 26; 14 HARV. L. REV. 71. So, too, the American authorities, contrary to the principal case, generally hold an infant liable for conversion on the unauthorized use of a chattel bailed. *Churchill v. White*, 58 Neb. 22, 78 N. W. 369; *Freeman v. Boland*, 14 R. I. 39; *Towne v. Wiley*, 23 Vt. 355. *Contra*, *Penrose v. Curren*, 3 Rawle (Pa.) 351. In fact, the phrase "tort arising out of contract" is obscurely applied. For instance, it is said that the negligent injury of a bailed article is substantially a breach of an implied promise of careful use, for which the infant cannot be sued merely by changing the form of action. *Young v. Muhling*, 48 N. Y. App. Div. 617, 63 N. Y. Supp. 181. By this reasoning an intentional injury, being *a fortiori* a breach of contract, could not sustain an action *ex delicto* against the infant. But the law is otherwise. *Moore v. Eastman*, 1 Hun (N. Y.) 578. See *Eaton v. Hill*, 50 N. H. 235, 240. If it be granted that there is sound policy in holding an infant for his torts, the mere circumstance that he has possession of another's property by virtue of an unenforceable contract should not afford him greater license. The principal case would seem entirely too solicitous of the infant. *Cf. Burnard v. Haggis*, 14 C. B. N. S. 45.

INSURANCE — RE-INSURANCE — LIABILITY OF RE-INSURER TO INSURED WHO ACCEPTS ASSIGNMENT OF RE-INSURANCE CONTRACT IN SATISFACTION OF HIS CLAIM. — The re-insurer of a suretyship company covenanted to pay the

company all damages for which it should become responsible on a bond to indemnify the plaintiff, before the company was compelled to pay. The plaintiff recovered against the suretyship company on the bond, and in satisfaction of the judgment accepted an assignment of the claim against the re-insurer. *Held*, that the plaintiff can recover on the assigned claim. *MacArthur Bros. Co. v. Kerr*, 107 N. E. 572 (N. Y.).

For a discussion of the liability of a re-insurer, see 28 HARV. L. REV. 302. As is there pointed out, if the contract in the principal case required the re-insurer to pay an insolvent re-insured the full amount of a claim, rather than the dividend to which the insured was entitled, it should be void in its inception as against public policy. See *Hunt v. N. H. Fire U. Ass'n*, 68 N. H. 305, 309, 38 Atl. 145, 147. Such a construction, however, should not be adopted unless no other would satisfy the terms of the contract. In the principal case, since the agreement does not explicitly require a payment of more than the surety, if insolvent, would have to pay, the result seems correct.

INSURANCE — RE-INSURANCE — MEASURE OF LIABILITY OF RE-INSURER WHEN INSURER INSOLVENT. — An insolvent indemnity company, which had re-insured some of its risks, was unable to pay more than a dividend on losses accruing under the risks re-insured. An order of the court below permitted the receiver to compromise the claims against the re-insurer for less than its unquestioned liability if the original insurer had been able to pay in full. *Held*, that the order was not an abuse of judicial discretion. *MacDonald v. Aetna Indemnity Co.*, 92 Atl. 154 (Conn.).

As the solvency of the re-insurer was not denied, the decision must be explained on the ground that the legal sufficiency of the receiver's claim to the full amount of the loss was at least doubtful. This is a noteworthy step toward a desirable result, opposed to the entire current of common-law authority, for the English case on which the court relies was reversed on appeal. *In re Law Guarantee Trust and Accident Society, Ltd.*, [1914] W. N. 291 (C. A.). For a criticism of the prevailing doctrine concerning the liability of a re-insurer, as exemplified by that decision, see 28 HARV. L. REV. 302.

LANDLORD AND TENANT — RENT — LIABILITY FOR RENT AFTER BREACH OF COVENANT BY THE LANDLORD. — The plaintiff leased a room to the defendants to be used as a jewelry store, and covenanted not to rent any other store in the building to a tenant making a specialty of the sale of pearls. In consequence of the violation of this covenant, the defendant quit the premises and refused to pay any further instalments of rent. The plaintiff sues for the rent. *Held*, that the plaintiff cannot recover. *University Club of Chicago v. Deakin*, 106 N. E. 790 (Ill.).

The principal case reaches a sensible result and would be beyond criticism if the question could be considered *res integra*. A lease is really a continuing contract, and might well be treated like any other bilateral contract. But covenants for rent in leases are generally regarded as independent, and the tenant is not excused from liability by reason of the landlord's breach of covenant. *Paradine v. Jane*, Aleyn 26; *Lewis & Co. v. Chisholm*, 68 Ga. 40. The basis for this view appears to be that the lessee has received full consideration by acquiring an estate in the land. *Fowler v. Bott*, 6 Mass. 63. Another reason is that the law as to covenants in leases developed long before the contractual theory of implied conditions had been fully worked out. The harshness of the rule has been somewhat mitigated by allowing the tenant to terminate the lease when the premises have become untenable. *Piper v. Fletcher*, 115 Ia. 263, 88 N. W. 380; *Bissell v. Lloyd*, 100 Ill. 214. This result has been generally achieved by statute. CONSOL. LAWS N. Y., REAL PROPERTY LAW, § 227; GEN. STAT. MINN., § 6810. But the principle on which the tenant is absolved is not

that his covenant is dependent, but that there has been a constructive eviction. Where, as in the principal case, one room in a building is let, the principles of ordinary bilateral contracts might well be applied, since the lessee gets no estate in the land. See *Shawmut National Bank v. Boston*, 118 Mass. 125. But even in such cases the extension in the law would seem too radical to be made without the aid of a statute. But see *Delmar Investment Co. v. Blumenfeld*, 118 Mo. App. 308, 322, 94 S. W. 823, 828. Cf. *Chicago Legal News Co. v. Browne*, 103 Ill. 317.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — COMPELLING CITY OFFICIALS TO SUBMIT ALLEGED UNCONSTITUTIONAL ORDINANCE TO POPULAR VOTE. — A statute provided that the board of city commissioners should submit to popular vote any measure proposed by a certain percentage of the qualified voters. The commissioners refused to hold such an election, on the ground that the proposed measure would be unconstitutional. *Held*, that mandamus will issue against them. *State ex rel. Foote v. Board of Commissioners*, 144 Pac. 241 (Kan.).

The court objects that the constitutionality of the proposed ordinance is a purely moot question. It is true that the courts so far hesitate to pass upon the constitutionality of legislative acts that they allow the point to be raised only by one whose rights are threatened. *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543, 579. Moreover, courts will ordinarily refuse to restrain the legislative function of passing municipal ordinances, however unconstitutional they appear to be. *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 962. In the ordinary case, where the mere passing of the ordinance involves no injury or expense, adequate relief is secured by refusing to enforce it when asserted. In the principal case, however, to submit the ordinance to popular vote would involve a large expenditure of public money. Moreover, equity could effectively prevent the expense by a decree against the commissioners, giving relief by analogy to its well-established jurisdiction to enjoin the waste of public funds at the suit of a taxpayer. See *Solomon v. Fleming*, 34 Neb. 40; *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820; 28 HARV. L. REV. 309. Such considerations might well justify the court in refusing mandamus, where the invalidity of the proposed ordinance, if passed, would be undoubted; but they lose their force where, as in the principal case, the constitutionality of the ordinance was not seriously questioned.

MASTER AND SERVANT — WORKMAN'S COMPENSATION ACTS — EFFECT OF ILLEGALITY OF CONTRACT OF EMPLOYMENT. — In an action under the Workman's Compensation Act for injuries received by an employee in the course of his employment, it appeared that the plaintiff's wages were to have been paid in food and drink, in violation of the Truck Acts, 1 & 2 Wm. IV, c. 37, 50 & 51 Vict., c. 46. *Held*, that the plaintiff cannot recover compensation. *Kemp v. Lewis*, 111 L. T. R. 699 (C. A.).

The case is one of first impression and its result seems questionable, if the relation of master and servant in fact existed. At common law, each party is subject to the incidents of the relation, although bound by no enforceable contract. Thus an infant whose contract is voidable may be barred by assumption of the risk. *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270. Likewise an employer, who has the right to avoid the contract because of the employee's fraudulent misrepresentation, may still be liable for the violation of a relational duty resulting in injury to the employee. *Galveston, H. & S. A. Ry. Co. v. Harris*, 48 Tex. Civ. App. 434, 107 S. W. 108; *Lupher v. Atchison, T. & S. F. R. Co.*, 81 Kan. 585, 106 Pac. 284. *Contra*, *Norfolk & Western Ry. Co. v. Bondurant's Adm'r*, 107 Va. 515, 59 S. E. 1091. Doubtless a contract to

accomplish an illegal object would prevent a servant engaged in its performance from recovering for injury. *Wallace v. Cannon*, 38 Ga. 199. But it seems that illegality in the form and not in the object of the contract, although it makes the contract void, should not affect the existence or the incidents of the relation. One of these relational duties is that imposed by the Workman's Compensation Act. See DICEY, *LAW AND PUBLIC OPINION*, pp. 282-283. Even if the duty to pay compensation is regarded as contractual, it is difficult to support the principal case. The primary purpose of the Truck Acts is the protection of the employee. See *Archer v. James*, 2 B. & S. 67, 83. He is allowed to avoid any contract for the payment of his wages otherwise than by money; and he may recover such wages though he has received full value in some other form. Consequently it is strange, to say the least, to give the statute such an effect as to deprive the workman of his right to compensation for injury.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — RECOVERY UNDER STATUTE OF PLACE OF INJURY WHILE EMPLOYED UNDER CONTRACT MADE ELSEWHERE. — The plaintiff's intestate, while employed in New Jersey under a contract made in the state of New York for work to be done partly in each state, suffered a fatal injury in the course of his employment. The New Jersey workmen's compensation act imposes a system of compensation on all employments within the state, unless the parties expressly elect otherwise. N. J. LAWS OF 1911, c. 95, § ii; c. 368. The plaintiff sues to recover compensation under the New Jersey law. *Held*, that plaintiff may recover. *American Radiator Co. v. Rogge*, 92 Atl. 85 (Sup. Ct., N. J.).

The problems in the conflict of laws arising under workmen's compensation acts where the same employment is carried on in two or more states were discussed in 27 HARV. L. REV. 271. In view of that discussion, the principal case seems clearly sound in applying the law of the place of injury, since the New Jersey act simply substitutes for the master's tort liability, by an agreement imposed by the law, a statutory liability broader in scope. N. J. LAWS OF 1911, c. 95, § ii, cl. 9; c. 368. See *Johnson v. Nelson*, 150 N. W. 620 (Minn.). However, another form of statute under which the employer creates a right for the employee against some state insurance fund, or private insurance company, might well have extraterritorial application. See *Schweitzer v. Hamburg American S. S. Co.*, 78 N. Y. Misc. 448, 138 N. Y. Supp. 944; *Gould's Case*, 215 Mass. 480, 483, 102 N. E. 693, 694; 27 HARV. L. REV. 271. To avoid the inconvenience, uncertainty, and expense consequent upon an injury in the course of an employment contracted in a jurisdiction having the insurance type of statute, but carried on in another jurisdiction like that of the principal case, it seems desirable to have some uniform provision permitting employers whose business is carried on under such circumstances to elect to provide compensation under the law of the jurisdiction in which the principal establishment is located.

MORTGAGES — FORECLOSURE — DEFECT OF TITLE AS DEFENSE TO PURCHASE-MONEY MORTGAGE. — The plaintiffs conveyed land as trustees under a power of sale and took back a purchase-money mortgage. The land passed to the defendants by *mesne* conveyances, each grantee, including the defendants, assuming the mortgage. The defendants are still in undisturbed possession, but resist foreclosure on the ground that the original power of sale was invalid as a restraint upon alienation. *Held*, that foreclosure will be decreed. *Peabody v. Kent*, 213 N. Y. 154.

While the original purchaser or his grantee remains in undisturbed possession of land, no defect of title in the grantor will afford a defense to the foreclosure of a purchase-money mortgage. *Hulfish v. O'Brien*, 20 N. J. Eq. 230; *Black*

v. *Thompson*, 136 Ind. 611, 36 N. E. 643; *Parkinson v. Sherman*, 74 N. Y. 88; *Platt v. Gilchrist*, 3 Sandf. (N. Y.) 118. See 8 HARV. L. REV. 119. Even the pendency of an action at law by a third party to assert paramount title is not a conclusive answer to foreclosure proceedings. *Banks v. Walker*, 2 Sandf. Ch. (N. Y.) 344; *Platt v. Gilchrist*, *supra*. But in such a case equity may stay foreclosure, pending the determination of the action at law. *Johnson v. Gere*, 2 Johns. Ch. (N. Y.) 546. See *Glenn v. Whipple*, 12 N. J. Eq. 50; *Edwards v. Bodine*, 26 Wend. (N. Y.) 109, 114. Fraud or mistake might, of course, furnish a basis for rescission. *Finck v. Canadaway Fertilizer Co.*, 152 N. Y. App. Div. 391, 136 N. Y. Supp. 914; *Matter of Price*, 67 N. Y. 231. See *Parkinson v. Sherman*, *supra*, 94. But in the principal case any defect of title was patent on the records, so that relief of this sort was impossible. Whenever the purchaser is protected by covenants, he may of course recover for any breach of warranty, and will even have a defense to foreclosure by way of circuitry of action, if there has been eviction by or surrender to paramount title. See *Platt v. Gilchrist*, *supra*. The later acquisition of paramount title by the purchaser, moreover, will not inure to the benefit of the grantor, where the mortgage contains no warranty of title. *Brown v. Phillips*, 40 Mich. 264. Cf. *Jackson v. Littell*, 56 N. Y. 108. This should be equally the case where the deed and the mortgage each contain full covenants. *Randall v. Lower*, 98 Ind. 255. Cf. *Bush v. Marshall*, 6 How. (U. S.) 284. But where the mortgage warrants title, and the original deed does not, it will be completely enforceable. *Saunders v. Publishers' Paper Co.*, 208 Fed. 441; *Hitchcock v. Fortier*, 65 Ill. 239.

NEGLIGENCE — DUTY OF CARE — LIABILITY FOR OPERATION OF AUTOMOBILE IMPROPERLY REGISTERED. — The owner of an improperly registered automobile permitted his son to take it for a ride. The son negligently injured the plaintiff. *Held*, that the father's failure to register the car according to law renders him liable for the son's negligence. *Gould v. Elder*, 107 N. E. 59 (Mass.).

For a discussion of this case, as the latest development of the Massachusetts law concerning the relation of illegal conduct to negligence, see this issue of the REVIEW, at page 505.

NEGLIGENCE — LIABILITY FOR FIRE LOSS CAUSED BY INJURY TO THIRD PARTY'S HOSE. — A fire hose which lay across the track was negligently cut by a street car of the defendant company's. In consequence certain goods of the plaintiff's which were stored in the burning building were destroyed. *Held*, that the plaintiff may recover. *Birmingham, E. & B. R. Co. v. Williams*, 66 So. 653 (Ala.).

For a discussion of this case, see NOTES, p. 511.

NEGLIGENT MISREPRESENTATION — PARTICULAR CASES — ATTORNEY AND CLIENT: NEGLIGENT STATEMENT AS TO SECURITY. — The defendant, as solicitor for the plaintiff, induced him to release certain lands from a mortgage, by negligently misrepresenting the value of the remaining security. The defendant himself had a subsequent lien on the lands released, and the security retained by the plaintiff proved wholly inadequate. The lower court found that there had been no conscious misrepresentation by the defendant. *Held*, that the plaintiff can nevertheless recover. *Nocton v. Lord Ashburton*, [1914] A. C. 932.

Where there exists between the parties merely a general duty to be honest, a negligent misrepresentation will not make the defendant liable. *Derry v. Peek*, L. R. 14 A. C. 337; *Angus v. Clifford*, [1891] 2 Ch. 449. This doctrine has been much criticised in both England and America. 5 LAW QUART. REV. 410; 14 HARV. L. REV. 185; 24 *id.* 415. And it has not been universally followed in the courts of this country. See *Cunningham v. C. R. Pease, etc. Co.*, 74 N. H. 435, 69 Atl. 120. Cf. *Watson v. Jones*, 41 Fla. 241, 25 So. 678;

Krause v. Busacker, 105 Wis. 350, 81 N. W. 406. But even if the rule be adopted, subsequent cases have made it clear that it does not affect the well-settled principles that conscious misrepresentation is not necessary to an implied warranty of an agent's authority, to a warranty, to an estoppel, or in cases where a relational duty to know the truth exists between the parties. *Starkey v. Bank of England*, [1903] A. C. 114. See *Low v. Bowwerie*, [1891] 3 Ch. 82, 101; *De la Bere v. Pearson, Ltd.*, [1908] 1 K. B. 280. In accord with the instant case, therefore, attorneys may be held for damages sustained by their clients by reason of negligent advice. *Byrnes v. Palmer*, 18 N. Y. App. Div. 1, 45 N. Y. Supp. 479; *Jamison v. Weaver*, 81 Ia. 212, 46 N. W. 996. Cf. *Purves v. Landell*, 12 Cl. & F. 91. In view of the benefit that accrued to the attorney from the misrepresentation, recovery may also be had upon the principle that a fiduciary will not be allowed to profit by the breach of his obligation, however innocent he may have been of conscious falsification. *Buckley v. Wilford*, 2 Cl. & F. 102; *Gibbons v. Hoag*, 95 Ill. 45; *Hoopes v. Burnett*, 26 Miss. 428.

NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — LIMITATION TO ISSUE OF PLAINTIFF'S CAPACITY. — An administratrix brought suit without alleging or proving her appointment and qualification. This defect was considered immaterial and not taken advantage of, but after verdict and judgment for plaintiff, pending appeal, a decision showed that this defect was demurrable. There was no other error in the proceedings to justify a new trial. *Held*, that a new trial will be granted, but limited to the issue made on the omitted averment. *Moss v. Campbell's Creek R. Co.*, 83 S. E. 721 (W. Va.).

From the earliest times there has been a notion that the issues of a case after verdict were entirely inseparable and that a new trial must involve a reopening of the whole case. *Bond v. Spark*, 12 Mod. 275. See *contra*, *King v. Mawbey*, 6 T. R. 619, 638. A new trial, however, has never been regarded as a matter of right, but rather as a method of securing justice and correcting errors. *Hutchinson v. Piper*, 4 Taunt. 555. Consequently, if as a matter of fact the situation is such that the error is confined to a particular portion of the case and those issues are distinct and can be severed from the rest, the ends of justice will be better served by preserving the good and discarding only what is erroneous. *Lisbon v. Lyman*, 49 N. H. 553, 582. This result has been reached in cases where the error was solely in regard to damages. *Boyd v. Brown*, 17 Pick. (Mass.) 453, 461. But cf. *Cerny v. Paxton & Gallagher Co.*, 83 Neb. 88, 119 N. W. 14. See also 22 HARV. L. REV. 540. A similar procedure has been followed where the only error was on the issue of the plaintiff's capacity, as in the principal case. *Robbins v. Townsend*, 20 Pick. (Mass.) 345. Whether or not in a given case a partial retrial will be proper must depend largely on its peculiar facts and on the discretion of the court as to the balance between public convenience and justice to the parties. *Hall v. Hall*, 131 N. C. 185, 42 S. E. 562. In some states the matter is covered by statute. See *Smith v. Whittlesey*, 79 Conn. 189, 63 Atl. 1085.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — VALUATION FOR RATE PURPOSES. — A public service company had a non-exclusive revocable franchise. The Public Utility Commissioners ordered that no value be assigned to this franchise beyond the actual cost of procuring it when they computed the "present value" of the company's property, as a preliminary to regulating its rates. The Supreme Court of the state upheld this order. 84 N. J. L. 463. On appeal to the Court of Errors and Appeals, *held*, that the order be reversed. *Public Service Gas Co. v. Board of Public Utility Commissioners*, 92 Atl. 606 (N. J.).

See NOTES, p. 501, on the question of valuing franchises for rate-making and other purposes.

RAILROADS — REGULATION OF RATES — STATUTORY PENALTY FOR VIOLATION OF STATE COMMISSION'S ORDER. — The Georgia Railroad Commission ordered the defendant railroad to cease demanding prepayment of freight from one connecting carrier and not from another, in order to avoid discrimination in favor of the longer route in violation of a state statute. The defendant took no steps to contest the order, and after two months the state brought suit for the penalty provided by the statute for violating the orders of the commission. *Held*, that the railroad may be held liable. *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651.

The commission's order was found reasonable by the state supreme court. *Wadley Southern R. Co. v. Georgia*, 137 Ga. 497, 73 S. E. 741. In view of the discretion vested in the commission, this decision is unimpeachable, although on somewhat similar facts other courts have found that there was no discrimination. *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.*, 168 Fed. 161. See 27 HARV. L. REV. 754. The question before the court in the principal case, therefore, was whether the order violated the Fourteenth Amendment. Such administrative orders are legislative in nature, though founded on judicial inquiry, and the parties affected are clearly entitled to review by the courts. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 313. Accordingly, statutes which provide penalties so enormous as to deter litigating the validity of the rates imposed, have been held invalid as denying the equal protection of the laws and as depriving the carrier of property without due process of law. *Ex parte Young*, 209 U. S. 123; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53. The courts have reasoned that the carrier would rather obey an invalid order than risk incurring the tremendous penalty which might be imposed after long litigation. *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 349. See *Ex parte Wood*, 155 Fed. 190, 198. Where the statute expressly provides, however, for a judicial determination of validity, the present tendency is to construe the statute as imposing no penalty except for violations subsequent to such determination. *Washington v. Oregon R. & Nav. Co.*, 68 Wash. 160, 167, 123 Pac. 3, 6. This result has also been reached even where there was no express provision. See *Coal Co. v. Conley*, 67 W. Va. 129, 159, 67 S. E. 613, 626. If, however, as in the present case, the railroad fails to exercise seasonably its right to judicial review, and the rate or order is regarded as valid, the penalty may then be imposed for violations from the outset.

SELF-DEFENSE — DUTY TO RETREAT — ATTACK BY ANOTHER INHABITANT IN ONE'S OWN HOME. — The defendant, being attacked by his son in the house where both resided, shot and killed his assailant without attempting to escape. *Held*, that the defendant is excused. *People v. Tomlins*, 107 N. E. 496 (N. Y.).

By the weight of authority, a man who is attacked must "retreat to the wall," if he can do so with safety, before killing his assailant. *Commonwealth v. Drum*, 58 Pa. St. 9; *Patterson v. State*, 146 Ala. 39, 41 So. 157. Cf. *Erwin v. State*, 29 Oh. St. 186; *Runyan v. State*, 57 Ind. 80. See 16 HARV. L. REV. 567. But one who is attacked in his own dwelling, or on his premises adjacent thereto, need not seek safety in flight, since a man's home is his "castle," and he should not be compelled to leave its shelter. *State v. Bissonnette*, 83 Conn. 261, 76 Atl. 288; *State v. Rutledge*, 135 Ia. 581, 113 N. W. 461. He need not even retreat to another part of the house. *Brinkley v. State*, 89 Ala. 34, 8 So. 22. It would seem wholly immaterial, furthermore, that the assailant lived under the same roof, and accordingly the rule has been applied to attacks by a joint tenant, or by a husband or wife. *Jones v. State*, 76 Ala. 8; *Hutcherson v. State*, 170 Ala. 29, 54 So. 119; *Watts v. State*, 177 Ala. 24, 59 So. 270. Guests are accorded this same privilege of resistance. *Jacobs v. State*, 146 Ala. 163, 42

So. 70. Boarders, on the other hand, must retreat to their own rooms, at least when attacked by another inhabitant of the house. *People v. Sullivan*, 7 N. Y. 396; *State v. Dyer*, 147 Ia. 217, 124 N. W. 629. In opposition, however, to the whole doctrine exempting one attacked in the dwelling-house from the duty to retreat, it may be argued that when the assailant has entered the "castle," it has ceased to be protection for the owner, and that there is accordingly no longer reason why he should not flee to avoid the necessity of killing. See MAY, CRIMINAL LAW, 2 ed., § 67.

SURETYSHIP — SURETY'S DEFENSES: MISCELLANEOUS — EFFECT OF ASSIGNMENT OF BUILDING CONTRACT BY CONTRACTOR ON RIGHTS OF MATERIALMEN. — The defendant company was surety on the bond of a contractor for the faithful performance of a contract with the United States for the erection of a naval station, and for the prompt payment of all persons supplying "labor and materials in the prosecution of the work." The contractor, being unable to complete the work, transferred his business, without the knowledge of the United States or the defendant, to a new corporation of which he was manager. The materialmen continued to furnish materials to this corporation with knowledge of the assignment, and on the bankruptcy of the contractor and the new corporation, seek to hold the surety company on the bond. *Held*, that they may recover. *The John Davis Co. v. Illinois Surety Co.*, 47 Chic. Leg. News 177 (C. C. A., Seventh Circ.).

Sureties on the bonds of contractors for the prompt payment of all persons furnishing labor and materials for the work are generally held directly liable to materialmen. *Abbott v. Morrisette*, 46 Minn. 10, 48 N. W. 416. Such a bond is construed as essentially a substitute for a mechanics' lien, and extends to materials furnished to a sub-contractor or assignee. *Hill v. American Surety Co.*, 200 U. S. 197; see *Hardaway v. National Surety Co.*, 150 Fed. 465, 471. Accordingly, the surety may remain liable on his independent obligation to the materialmen, although discharged from his undertaking to the landowner by some act of the latter. *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806. In the principal case, therefore, even the acceptance of a new contractor by the government would not in itself have discharged the defendant from its obligation to the materialmen. The absence of such assent, however, did show that there had been no novation of principals, and that the continued furnishing of materials by the materialmen did not involve, therefore, any recognition of a new principal on their part. The materialmen, then, must be deemed simply to have taken the new corporation as additional security, and to have retained their rights against the contractor. Such conduct clearly could give the surety no legal defense, and any variation of the risk that might be involved would be too unsubstantial to discharge the surety, in view of the growing tendency of the law to hold surety companies to their obligations in spite of metaphysical variations of the risk. See *Rule v. Anderson*, 160 Mo. App. 347, 142 S. W. 358.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — FEDERAL AGENCY: STATE TAXATION OF INDIAN COAL MINES. — The United States leased the right to operate coal mines on lands in Oklahoma belonging to the Choctaw and the Chickasaw Indians, to the plaintiff, under a compact with the Indians to operate the mines in the interests of the tribes. Oklahoma then levied a gross revenue tax on all coal producers. *Held*, that the plaintiff is exempt from the tax. *Choctaw, Oklahoma, & Gulf R. Co. v. Harrison*, 235 U. S. 292.

That neither state nor nation can clog the governmental functions of the other by taxation is a necessary and an established proposition. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Collector v. Day*, 11 Wall. (U. S.) 113. But what constitutes a governmental function is a perennial problem, not

easily solved. One clear-cut line has been drawn. No enterprise ordinarily regarded as private becomes a governmental function simply because undertaken by a state. *South Carolina v. United States*, 199 U. S. 437. See 19 HARV. L. REV. 286. The principal case suggests that there is no corresponding limitation when an otherwise private industry is indulged in by the national government. Whatever the latter does, it does by virtue of its express or implied powers, and is supreme, even though what it has undertaken to do conflicts with what would otherwise be within the constitutional power of the state. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533. Cf. *Briscoe v. Bank of Kentucky*, 11 Pet. (U. S.) 257. See 23 HARV. L. REV. 465. Nowhere is the independence of the federal government better recognized than in its relations with the Indians. In this field its control is exclusive. *Worcester v. Georgia*, 6 Pet. (U. S.) 515. See *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, 17; *United States v. Holliday*, 3 Wall. (U. S.) 407, 417. Accordingly, whatever it undertakes in their behalf it will see through, despite attempted interference by state taxing power. This freedom from state taxation, however, is limited narrowly to the accomplishment of the federal purpose. *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5; *National Bank v. Commonwealth*, 9 Wall. (U. S.) 353. Hence, in the principal case, the court intimates that a tax on the coal after it had become the personal property of the lessee would be valid. See *Thomas v. Gay*, 169 U. S. 264, 273.

TAXATION — WHERE PROPERTY MAY BE TAXED — SUCCESSION TAX ON SECURITIES TEMPORARILY REMOVED FROM THE STATE. — The testatrix, who was domiciled in Florida, carried on a loaning business in Iowa through an agent there. The notes and mortgages securing the loans, which had been kept in Iowa, were removed, a short time before the testatrix's death, to a bank across the state line. Held, that they are subject to the Iowa inheritance tax. *In re Adam's Estate*, 149 N. W. 531 (Ia.).

An inheritance tax is the price exacted by the state for conferring the privilege of inheriting property by will or descent. Accordingly, the state where the property is located may tax its succession. *Matter of Whiting*, 150 N. Y. 27, 44 N. E. 715. But a mere chose in action, being intangible, properly has no *situs* anywhere. See 27 HARV. L. REV. 107, 113. Least of all can it be said to be located in the obligor's hands. *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300. Therefore a debt owed to a foreign decedent is not, as such, subject to an inheritance tax. *Matter of Preston*, 75 N. Y. App. Div. 250, 78 N. Y. Supp. 91. But see *Contra*, *In re Joyslin's Estate*, 76 Vt. 88, 56 Atl. 281. However, if the debt is represented by a specialty, the specialty itself, being capable of *situs*, may be taxed wherever found. *New Orleans v. Stempel*, 175 U. S. 309; *Wheeler v. Sohmer*, 233 U. S. 434. See 28 HARV. L. REV. 104. This reasoning will account for the principal case only on the assumption that the securities were removed from the state in order to evade taxation. See *Buck v. Beach*, 206 U. S. 392, 408; *Poppleton v. Yamhill County*, 8 Ore. 337. In any event, however, the capital employed in the loaning business, as measured by the notes, was in a sense the testatrix's stock in trade, with a *situs* in Iowa, and upon this ground also the tax may be upheld. *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395. See 28 HARV. L. REV. 214.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — JUSTIFICATION: STRIKE TO COMPEL DISCHARGE OF NON-UNION MEN. — The defendants, members of a trade union, by threatening a strike, induced their employers to discharge the plaintiffs, and to refuse to reemploy them on the ground that they had refused to join the union. Held, that the plaintiffs are entitled to damages and to an injunction. *Fairbanks v. McDonald*, 106 N. E. 1000 (Mass.).

The temporal interests of both workmen and employers are protected

against intentional disturbance when the disturbance, in the eyes of the law, is for a purpose which public policy does not sanction. The law's traditional bias in favor of competition has led the courts to accord traders and manufacturers complete competitive license, and injury sustained from such competition is not actionable merely because it was intentionally inflicted. *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25. But see TRADE COMMISSION ACT, FED. STAT. ANN., SUPP. 1915 60, 62. As to workingmen, a group of jurisdictions of which Massachusetts is the leader have conceived that public policy calls for a different view. Workingmen may strike to obtain better wages or working conditions from their own employers. *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036. See *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 113, 85 N. E. 897, 899. They may strike to get work away from other workmen. *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753. But they may not strike to strengthen the union in its struggle with employers. *Folsom v. Lewis*, 208 Mass. 336, 94 N. E. 316. The competitive self-interest which justifies coercive trade-union activity must, it is said, be an immediate, individual self-interest. *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603. The broader self-interest of which the union is a manifestation is considered too remote. And the social interest in trade unionism is disregarded. The principal case is therefore not an innovation. *Lucke v. Clothing Cutters & Trimmers Assembly*, 77 Md. 396, 26 Atl. 505; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327. *Contra*, *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 389; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389. Yet the shift of emphasis in modern jurisprudence from individual to social interests has gone far toward shaking the foundation on which the Massachusetts cases rest. See 14 HARV. L. REV. 219; 26 HARV. L. REV. 259. And see dissenting opinions by Mr. Justice Holmes in *Plant v. Woods*, 176 Mass. 492, 504, 57 N. E. 1011, 1015, and in *Coppage v. Kansas*, 236 U. S. 1, 27.

TORTS — UNUSUAL CASES OF TORT LIABILITY — SUIT BY WIFE FOR CAUSING IMPRISONMENT OF HUSBAND. — The defendant, in order to satisfy his dislike of the plaintiff's husband, encouraged him to commit adultery, and then procured his arrest and conviction. The plaintiff sues for loss of her husband's society and support caused by the imprisonment. *Held*, that she cannot recover. *Nieberg v. Cohen*, 92 Atl. 214 (Vt.).

For a discussion of this case, see NOTES, p. 511.

TRUSTS — CESTUI'S INTEREST IN THE RES — NATURE OF CESTUI'S INTEREST. The trustee and *cestui que trust* of a certain trust fund were citizens of New York. The *cestui* assigned his interest to the plaintiff, a citizen of Pennsylvania, who brought suit against the trustee in a federal District Court. Section 24 of the federal Judicial Code provides that the District Courts shall not have jurisdiction of "any suit to recover upon any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court . . . if no assignment had been made." The District Court dismissed the bill for want of jurisdiction. *Held*, that the decree be reversed, partly on the ground that the *cestui's* right under a trust was a property right and not a "chose in action" within § 24. *Brown v. Fletcher*, 235 U. S. 589, 35 Sup. Ct. 154.

For a discussion of the nature of the *cestui's* interest in the trust *res*, see NOTES, p. 507.

TRUSTS — CREATION AND VALIDITY — DIRECTION TO TRUSTEE TO EMPLOY A PARTICULAR PERSON AS ATTORNEY IN ADMINISTERING THE TRUST. — A testator directed in his will that the executors of his estate should employ

his son as attorney for the estate at a fixed yearly salary. The executors refused to comply with the direction. The son brings this action to compel the executors to employ him. *Held*, that he cannot enforce the direction. *In re Wallach*, 150 N. Y. Supp. 302 (App. Div.).

Whether the power of employment or the property of the estate to an extent sufficient for compensation be regarded as the *res*, there is apparently no inherent reason why a valid trust cannot be created by a definite and mandatory direction to executors or trustees to employ a designated person in services for the estate. Such directions have been held binding in a few instances, in regard to other than legal services. *Hibbert v. Hibbert*, 3 Meriv. 681; *Williams v. Corbet*, 8 Sim. 349. In many cases, however, the recommendations have been construed as merely precatory, because of the weakness of the words, the indefiniteness of the direction, or a supposed inconsistency with the gift of the beneficial interest in the property or the administration of the estate. *Shaw v. Lawless*, 5 Cl. & F. 129; *Finden v. Stephens*, 2 Phil. 142; *Foster v. Elsley*, 19 Ch. D. 518; *Jewell v. Barnes' Adm'r*, 110 Ky. 329, 61 S. W. 360. Where the direction is to employ as attorney, the American cases usually hold that such restrictions are contrary to the policy of the law. *Young v. Alexander*, 16 Lea (Tenn.) 108; *In re Ogier's Estate*, 101 Cal. 381, 35 Pac. 900; *In re Pickett's Will*, 49 Ore. 127, 89 Pac. 377; *In re Caldwell*, 188 N. Y. 115, 80 N. E. 663. The necessity for coöperation between trustee and attorney in their confidential relation appears to afford basis for this conclusion.

WITNESSES — IMPEACHMENT — PARTY'S OWN WITNESS: BY PRIOR CONTRADICTORY STATEMENTS. — In a trial for fornication, the prosecutrix, as a witness for the state, denied the commission of the act. The prosecuting attorney declared that he was not surprised. Prior statements of the prosecutrix were then offered to impeach her testimony. *Held*, that the evidence is inadmissible. *State v. MacRorie*, 92 Atl. 578 (N. J. Sup. Ct.).

In a murder trial, witnesses for the people, to the surprise of the prosecution, testified that they could not identify defendant as the one who fired the shots. Evidence of their previous identification of the defendant was then offered. *Held*, that the evidence is inadmissible. *People v. De Martini*, 213 N. Y. 203.

The common law universally forbids impeachment of a party's own witness by character evidence. *Southern Bell Telephone, etc. Co. v. Mayo*, 134 Ala. 641, 33 So. 16. See 2 WIGMORE, EVIDENCE, § 900. But independent contradictory evidence indirectly discrediting the witness has generally been admitted. *Pacific Mutual Life Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087; *United States Brewing Co. v. Ruddy*, 203 Ill. 306, 67 N. E. 799. The chief difficulty has arisen in regard to the admission of the witness's prior contradictory statements, as in the two principal cases. Such statements have generally been excluded. *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499; *Coulter v. American Merchants', etc. Express Co.*, 56 N. Y. 585. The objections usually made are that a party guarantees his witness's credibility and that there will be danger of coercion by threats of impeachment. See *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534, 545; *People v. Safford*, 5 Denio (N. Y.) 112, 118. See also BULLER, NISI PRIUS, 7 ed., 297 a. The former ground has frequently been shown illogical and untrue and the latter is of no cogency. See 11 AM. L. REV. 261; 2 WIGMORE, EVIDENCE, §§ 898-899. The result, moreover, is often unfair, and in some states relief has been sought by statutes which make the witness's prior statements admissible where the party has been entrapped or surprised. GA. CODE, 1911, § 5879. Since no firmly fixed legal precedents would be violated, and reason and justice would be better served, this result should properly be reached even at common law, as the New Jersey case suggests. *Hurlburt v. Bellows*, 50 N. H. 105; *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 233, 94

S. W. 876, 881; *State v. Kysilka*, 85 N. J. L. 712, 90 Atl. 309. Any hearsay danger, moreover, can be obviated by instructions. See *Wright v. Beckett*, 1 M. & Rob. 414, 419; 2 WIGMORE, EVIDENCE, § 1018. In a great many American jurisdictions statutes make these contradictory statements admissible under all circumstances. See 2 MASS. REV. L. 1902, c. 175, § 24; CAL. CODE CIVIL PROCEDURE, 1909, § 2049; 1 IND. REV. STAT., 1914, § 531. Compare 17 & 18 VICT., c. 125, § 22 (1854). It is questionable, however, whether it is wise to dispense with the trial judge's discretion, or to admit the prior statements under any circumstances, where the party never hoped to elicit the truth but was seeking some dramatic effect.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN: WAIVER BY PATIENT'S TESTIMONY CONCERNING PHYSICAL CONDITION. — A statute forbade the examination of a physician as to any "communication made by his patient" or "any knowledge obtained by personal examination of such patient," unless the patient consent or voluntarily testify "with reference to such communications." Though the plaintiff had testified as to his injuries, his objection to the examination of his physician was sustained by the trial court. *Held*, that the ruling is correct. *Arizona & New Mexico Ry. Co. v. Clark*, 235 U. S. 669.

For the patient to offer evidence as to the communication made to a physician is a waiver of the privilege as regards that physician. *Rauh v. Deutscher Verein*, 29 N. Y. App. Div. 483, 51 N. Y. Supp. 985; *Pittsburg C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969. But the offer of the testimony of one physician is not a waiver of privilege as to the testimony of other physicians not present in consultation with him. *Penn Mutual Life Ins. Co. v. Wiler*, 100 Ind. 92; *Barker v. Cunard S. S. Co., Ltd.*, 91 Hun (N. Y.) 495, 36 N. Y. Supp. 256. *Contra*, *State v. Long*, 257 Mo. 199, 165 S. W. 748. See 28 HARV. L. REV. 116. Thus it appears that it is not the purpose of these statutes to keep secret the ailments of the patient, but to protect the communications which he makes to his physician. The knowledge gained by the physician through a physical examination of the patient, as well as what he is told by the patient, constitutes a communication within the meaning of the statutes. *Prader v. National Masonic Accident Ass'n*, 95 Ia. 149, 63 N. W. 601; *Rose v. Supreme Court*, 126 Mich. 577, 85 N. W. 1073. But for the patient to testify as to his symptoms, as in the principal case, without mentioning anything spoken or disclosed to the physician, since it is not giving in evidence any communication made by word or act, is properly held not a waiver of the privilege. *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520; *May v. Northern Pacific Ry.*, 32 Mont. 522, 81 Pac. 328; *Williams v. Johnson*, 112 Ind. 273, 13 N. E. 872. *Contra*, *Forrest v. Portland Ry. L. & P. Co.*, 64 Ore. 240, 129 Pac. 1048. But see 4 WIGMORE, EVIDENCE, § 2389. This conclusion receives support from analogous decisions with reference to privileged communications between attorney and client. *State v. White*, 19 Kan. 445; *Bigler v. Reyher*, 43 Ind. 112. *Contra*, *Woburn v. Henshaw*, 101 Mass. 193. See 4 WIGMORE, EVIDENCE, § 2327.

BOOK REVIEWS

INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION. By A. V. Dicey. Eighth Edition. London: Macmillan and Company, Ltd. 1915. pp. cv, 577, 2.

Students of law and government have long since learned to welcome each new edition of this deservedly famous work, but the eighth edition will be especially appreciated for its introduction. Since Professor Dicey first published this book in 1884 great and far-reaching changes have occurred in the structure of the

British government. Each new edition has been brought down to date by annotations and changes in the text, but, as the author himself observes, "Recurring alterations destroy the original tone and spirit of any treatise which has the least claim to belong to the literature of England." He has, therefore, in the present edition in substance reprinted the seventh edition with an introduction which aims to summarize and analyze the changes which thirty years have wrought in the English Constitution. Such a departure is not one to be indiscriminately recommended (at least, in cases in which the original author is not the editor), but in this instance it is more than justified by the results. Nowhere will one encounter a more pleasing combination of cold, clean-cut analysis and red-blooded English patriotism than in this brief comparison of the English Constitution in 1884 and in 1914. The pages are filled with that warm glow which emanates from a strong belief in the future of the British Empire, not unmixed with a fervent desire to make things better where they seem at fault. Yet optimism and a just pride do not in the least impair the author's ability to state the problems which confront the nation with the deliberate dispassionateness of a scientist.

Thus, he is not entirely satisfied with the results of the Parliament Act of 1911, which, it will be remembered, destroyed the veto of the House of Lords on money bills, and left that House with only a suspensive veto on other public bills. This suspensive veto, he complains, is vexatious rather than effective. The requirement that the bill must pass the House of Commons in three successive sessions in substantially the same form in order to override the veto of the Lords blocks all amendment after the first passage, and results in the anomalous spectacle of an attempt to pass as an independent measure an amendment to a bill which has not yet become law. Moreover, the tendency of the changes brought about by that act is to increase the power of the party which for the time being has a parliamentary majority, and to concentrate that power in the hands of the cabinet as the guiding committee of that party. English government threatens to become more and more partisan government. The free lance in the House of Commons is becoming extinct. Party mechanism has become so rigid that the cabinet, supported by its solid majority in the House, has become absolute. The electorate is still nominally supreme, but its control threatens to become limited to the power of transferring the reins from one party to the other every five years. Parliament tends to become more and more a mere electoral college for registering the periodical mandate of the nation, and less and less the historical battle-ground of political opinion.

Professor Dicey, in fact, views with alarm the increasing dominance of the party machine in English government. Thus, he favors the referendum, or, as he calls it, "the people's veto," not as a touchstone of good government, but as a corrective of the more patent evils of party government, especially as a check upon the absolutism of the majority in Parliament, and as a means for the expression of opinion by the electorate without the embarrassment occasioned by the confusion of issues attendant upon a general election.

He also fears the effect of the Parliament Act upon the hitherto non-partisan and judicial character of the Speaker of the House of Commons, who is given the sole power to certify that a bill passed under the act complies with its provisions, a power which may induce the majority to desire a Speaker of its own political complexion.

The American reader will note with sympathetic interest Professor Dicey's uneasiness over the decline in reverence for the law in England. But observe how fairly he analyzes the problem. The domain of law has been threatened from two quarters. The increasing paternalism of government has led to the placing of judicial or quasi-judicial functions in the hands of administrative officers in many matters. This is a necessary accompaniment to the broadening scope of governmental activity. The judiciary is not adapted to handle

cases in which it is much more important to act promptly and firmly than to protect private rights and privileges. But there are limits even to such a delimitation of judicial powers, and Professor Dicey registers a firm protest against the apparently absolute immunity from court control of the Speaker of the House of Commons in certifying bills under the Parliament Act.

On the other hand, he remarks an increasing distrust of the courts and disrespect for the laws, whenever they seem to oppose the best interests of any social or political faction. Here he touches upon something which should be close to the quick of American public thought. He finds a reason for organized labor's distrust of the courts in the fact that the law has not proved itself adapted to compensate for economic inequalities, and hence seems to lend itself to perpetuating them. Thus, the trade unionist's natural enemy, "the blackleg," is nearly always within the law, while the labor unions have had to resort to the fiction of "peaceful picketing" and to legislation practically granting them immunity from the consequences of illegal action in order to battle on a strategic equality. This explanation of a perplexing problem seems even more applicable to American conditions, where legislative attempts to level up these economic disadvantages are constantly made abortive by the strict enforcement of constitutional limitations by the courts. Who can blame the workingman for distrusting courts which seem bent on emphasizing rather than alleviating his economic disadvantages?

The militant suffragette, of course, presents another phase of disrespect for law. Increasing democracy in government has a tendency to subvert the stability of the law. Public opinion becomes the Aladdin's lamp of progress, and all must bend before it. But, as has been well pointed out by President Lowell elsewhere, much that passes for public opinion to-day is neither public nor opinion. The result is that when any considerable body of agitators finds its policies opposed by the slow moving wheels of the law it cries, "Tyranny!" and forthwith demands progress without law. It is all much like the story of the mischievous shepherd and the wolves, — there have been so many false alarms that supporters of law and order are sometimes in doubt what is true public opinion and what is simply organized noise.

In his discussion of the new constitutional ideas which the past thirty years have brought forth Professor Dicey considers woman suffrage, proportional representation, federalism, and the referendum. His attitude toward the last has already been mentioned. In his discussion of woman suffrage he appears for the once carefully non-committal and vague, but intimates a hostility toward the full political equality of the sexes. He is, however, distinctly and more convincingly opposed to proportional representation, because it will complicate the electoral machinery and emphasize party domination, because it will lead to government by factions with all the untoward results which attend the disintegration of parties upon the Continent, and will undermine the stability of the parliamentary system.

Whatever his opinion of the conclusions which the author reaches, every student of government will read with respectful and absorbing interest his discussion of federalism and its application to the British Empire. His analysis of the weaknesses of federal government is profound and convincing. His contention that, "Federalism, when successful, has generally been a stage towards unitary government. In other words, federalism tends to pass into nationalism," and his citing the United States as an example of "a nation concealed under the form of a federation" may well cause the American reader to ponder. Federalism, he says, must not be confounded with nationalism in another sense. "A truly federal government is the denial of national independence to every state of the federation. No single state of the American Commonwealth is a separate nation; no state . . . has anything like as much of local independence as is possessed by New Zealand or any of the five Dominions." What Ireland has been demanding for so long is not federalism, but nationalism,

"Ireland a Nation." Professor Dicey is unalterably opposed to the federalization of the British Empire. The time is not ripe for any such hazardous experiment. It will tend to weaken rather than strengthen the Empire, and it is opposed to the entire course of development of British institutions.

The splendid tone of the entire introduction is typified by the words he uses in this connection. "I yield to no man in my passion for the greatness, the strength, the glory, and the moral unity of the British Empire. I am one of the thousands of Englishmen who approved, and still approve, of the war in South Africa, because it forbade secession. But I am a student of the British constitution; my unhesitating conviction is that the constitution of the Empire ought to develop, as it is actually developing, in the same way in which grew up the constitution of England." C. A. M.

HISTORY OF ROMAN PRIVATE LAW. Part II. Jurisprudence. By E. C. Clark. Cambridge: Cambridge University Press. 1914. 2 volumes. pp. xiv, 802.

One cannot read these volumes without a feeling of regret that so much learning and so much sound yet acute scholarship should have been expended upon the carrying out of so unfortunate a plan. The scope and the execution of the work were obviously determined by the exigencies of English university teaching upon the basis of Austin and the Roman institutional books in preparation for an examination in those subjects along settled lines. As Professor Clark tells us in his preface, candidates for examination may also be students; but the limitations imposed upon study and teaching by candidacy for examination before examiners who follow conventional lines are strikingly apparent even in a book prepared primarily for those studying a subject for its own sake. The two volumes are a critique of Austin with reference to the history of Roman law and an examination of the ideas of Roman jurists and institutional writers from the standpoint of English analytical jurisprudence. Hence we get neither a treatise upon jurisprudence nor a history of Roman law, though the work bears both titles. Moreover, the self-imposed limitations of English analytical jurisprudence exclude many things which would be valuable and significant in either type of book taken by itself.

In many particulars, however, Professor Clark has gone beyond the English analytical and historical jurists. Thus he rejects the once orthodox English view of the total irrelevancy of philosophy in jurisprudence (I, 24). In contrast with Austin's vigorous exclusion of every ethical element in duty and in political obligation he is willing to consider "popular morality," since it is a prime factor not only in the remote origin of law but in its "daily growth and improvement at the present time" (I, 86-87). The nineteenth century by way of reaction from the infusion of morals into law and identification of law and morals in the seventeenth and eighteenth centuries sought to separate them. It sought certainty rather than ethical results. It is very significant that the ethical side is again making itself felt in juristic writing, and in this respect Professor Clark's book is quite abreast of the current. This tendency appears also in connection with the appeal to popular morality in judicial consideration of what is reasonable (I, 106). He shows that this is what the Roman *aequitas* was, and of course it is what is demanded by those who insist upon equitable application of law in Continental Europe and those who insist upon a more liberal judicial application of law in this country. Again, he not only rejects the metaphysical method of the nineteenth-century philosophy of law for which the English have never had any taste, but he appears to throw over Sir Henry Maine's historical-metaphysical method and the resulting exclusively political interpretation of jurisprudence to which Maine's Ancient Law gave

such currency in the last century. What is of even more significance, while adhering to what I have called elsewhere the third stage of the Anglo-American analytical formula, by taking as the test of positive law "efficient existence" (I, 69), he goes further, and is willing to include under the term "positive law" rules and standards which get their efficiency from other than purely judicial tribunals. His formula is: "The rules and principles recognized and applied by the State's authorities judicative and executive" (I, 75). Here we have, so far as I know, the first recognition in analytical jurisprudence of the rise of executive justice in England of to-day. Nor is this all. "Taking *positive*," he says, "to indicate efficiency and importance, I should say that any rules of human conduct actually obtaining among any considerable number of human beings, in some manner connected or associated together, by virtue of *human sanctions*, might not improperly be called Positive Law" (I, 90). This should be compared with the chapter on investigation of living law in Professor Ehrlich's "Grundlegung der Soziologie des Rechts." If in the primitive community social control was effected through *fas* and *boni mores* as well as through *ius*, in other words, if religion and the internal discipline of the *gens* and the *collegium* played no less part once than that played by the law, we have to recognize that to-day, for example, the internal discipline of a labor union may be quite as effective an agency of social control as the law, and may actually supersede the law of the land in actual practice. While we need not use the term "positive law" for effective means of social control which lack the authority of the state, and, in the interest of critical terminology, probably ought not to do so, these are things which one who studies the law as a whole cannot afford to overlook and it is significant that the exclusive attitude which was once the glory of the English analytical jurist is not maintained.

It is evident, then, that the author was qualified not only by learning and scholarship but by sympathy with the modern movement in jurisprudence to write a textbook of the science of law in English which should do for a period of legal growth what Austin did for a period of legal stability. Unhappily the demands of a system of education whereby one must prepare students to be examined by others along traditional lines have prevented anything more than occasional adumbrations of what the author might have done and we could wish he had done. The book is not one of which the ordinary student of jurisprudence can make much use, nor was it probably intended for him. The teacher, on the other hand, may read it profitably, and indeed should resort to it continually in connection with the application of the analytical method to the Roman law and the bearing of Roman legal institutions upon the questions debated by Austin and his critics. It is a book of reference which no teacher can afford to overlook.

One would hardly expect from the Cambridge University Press "Remington" for Runninton (I, 105); "Spencer's" Equitable Jurisdiction for Spence's (I, 113); "*Gerichtsgebranch*" (I, 123), and much more of that sort; and it is not flattering to American scholarship to read of "Prof. Thayer" for Albert S. Thayer, Esq., of New York (I, 110); "Mr. A. S. Thayer of Harvard" (I, 135); or "Professor A. S. Lowell" (I, 211).

R. P.

THE HISTORY AND PRESENT POSITION OF THE BILL OF LADING AS A DOCUMENT OF TITLE TO GOODS (being the Yorke Prize Essay for the year 1913). By W. P. Bennett, B.A., LL.B. Cambridge: University Press. 1914. pp. viii, 101.

This little book is a creditable attempt to state systematically the result of the English decisions on bills of lading as documents of title. Their effect as contracts with the carrier is not discussed. An appendix presents briefly the

law of the United States, and such provisions of the Uniform Sales Act and of the Uniform Bills of Lading Act as vary from the common law are noted. A statement of the law of many of the countries of continental Europe and of South America, as well as the law of Japan, so far as the codes in those countries show their law, is also appended.

One who reads the body of the book, if he has in mind the purposes which merchants have attempted to accomplish by means of bills of lading, will be struck with the apparent desire of the courts to thwart these purposes wherever they seem to interfere with rules of the common law. The custom of merchants has not had such good fortune in the matter of bills of lading as in the matter of bills of exchange. The compromises which the courts have made have not always been harmonious, and Mr. Bennett does not wholly escape the imputation of believing inconsistent things at the same time because eminent judges have in different decisions authorized the inconsistency. On p. 49 he says: "It seems clear then that the property in goods at sea can be passed without the indorsement of a bill of lading." On p. 17, however, he says: "It is probable that a bill of lading which does not contain some such words as '*or order*' or '*or order or assigns*,' or which is specially indorsed but without the addition of those words after the name of the indorsee, does not on indorsement or reindorsement pass such legal property in the goods as the indorser intended to pass to the indorsee by the contract between them." It is hard to see, if the property can be passed without the indorsement of the bill of lading, why any particular form of bill of lading or of indorsement should be material for that purpose, when an intent to transfer the property is manifested. Indeed, the general conclusion of the author fortified by many statements in the decisions, seems to be, though he has nowhere distinctly formulated it, that apart from Factors Acts, the only importance of bills of lading is an inconclusive evidence of transactions which might equally well be carried out otherwise, — a poor kind of security on which to advance yearly hundreds of millions of pounds and dollars.

S. W.

BOUVIER'S LAW DICTIONARY. Volumes I, II, and III. By John Bouvier. Third Revision (eighth edition). By Francis Rawle. St. Paul: West Publishing Company. 1914. pp. xix, 3504.

True to its title, this revision of Bouvier's Law Dictionary is above all a "concise encyclopedia of the law." Since the last revision, in 1897, the encyclopedic titles have been more fully developed and brought down to date, until now they contain in compact form a remarkably complete outline of the various branches of the law. In this field, of course, the work is not intended, and could not hope to supplant the encyclopedias and digests now accessible to the profession. But as a convenient guide to the fundamental principles of the law, it is sure to prove valuable to the practitioner as well as the student, especially because of the wealth of material which it makes readily available. Well-chosen cases are cited in support of the propositions of law, and for the first time the names of all cases cited are given, with citations to all series of reports. Frequent references to treatises and legal periodicals, moreover, make each title a valuable guide to the secondary authority on the subject. It is especially gratifying to note many citations to the leading articles and editorial comment of this Review.

The development of the encyclopedic side of the work, however, has in no respect interfered with its independent worth as a dictionary. On the contrary, several thousand new titles of this sort have been added, so that it now constitutes a compendium of legal terms from the various systems of law that for practical purposes appears to be complete. The many additions to this re-

vision have been effected without such an enlargement of the work as to make it cumbersome. It now appears for the first time in three volumes, but they are executed in such a compact and serviceable form that convenient reference is assured. In fact, in every respect this revision maintains the excellence that has made Bouvier's the standard American dictionary of law.

S. P. G.

BENDER'S WAR REVENUE LAW, 1914. By the Publisher's Editorial Staff. Albany, N. Y.: Matthew Bender and Company. 1914. pp. xxviii, 181.

The so-called War Revenue Law of 1914 is a reminder of two things: the perverse elasticity of our tariff, and the economic interdependence of world nations. To meet the deficiency in our revenue caused by the war in Europe, Congress has been compelled to impose as an emergency measure much the same taxes which would be imposed were the United States actually involved in the war. In fact, the Act of 1914 is in a large measure a reenactment of the Act of 1898, passed as an emergency measure during the Spanish War.

The present act is distinctly an emergency measure, and fixes December 31, 1915, as the date when the new taxes shall cease. It repeals nothing of the existing revenue laws, but adds much, and is bound to give rise to numerous vexing legal questions. The publication of an annotated text of the law for the convenience of practitioners is, therefore, entirely justifiable and proper. Bender's War Revenue Law is that and no more. With a preliminary historical introduction and an entirely inadequate description of the internal revenue laws in general, the book contains the full text of the act with copious annotations and citations from the authorities, including departmental rulings, which although, of course, not binding on the courts, are precedents for administrative action and therefore of interest. On the whole the book appears to be as much of an emergency measure as the act itself, and suffers equally from hasty construction; a convenient guide in practice, but of little or no use to the student.

THE DEAF. By Harry Best. New York: Thomas Y. Crowell Company. 1914. pp. xviii, 340.

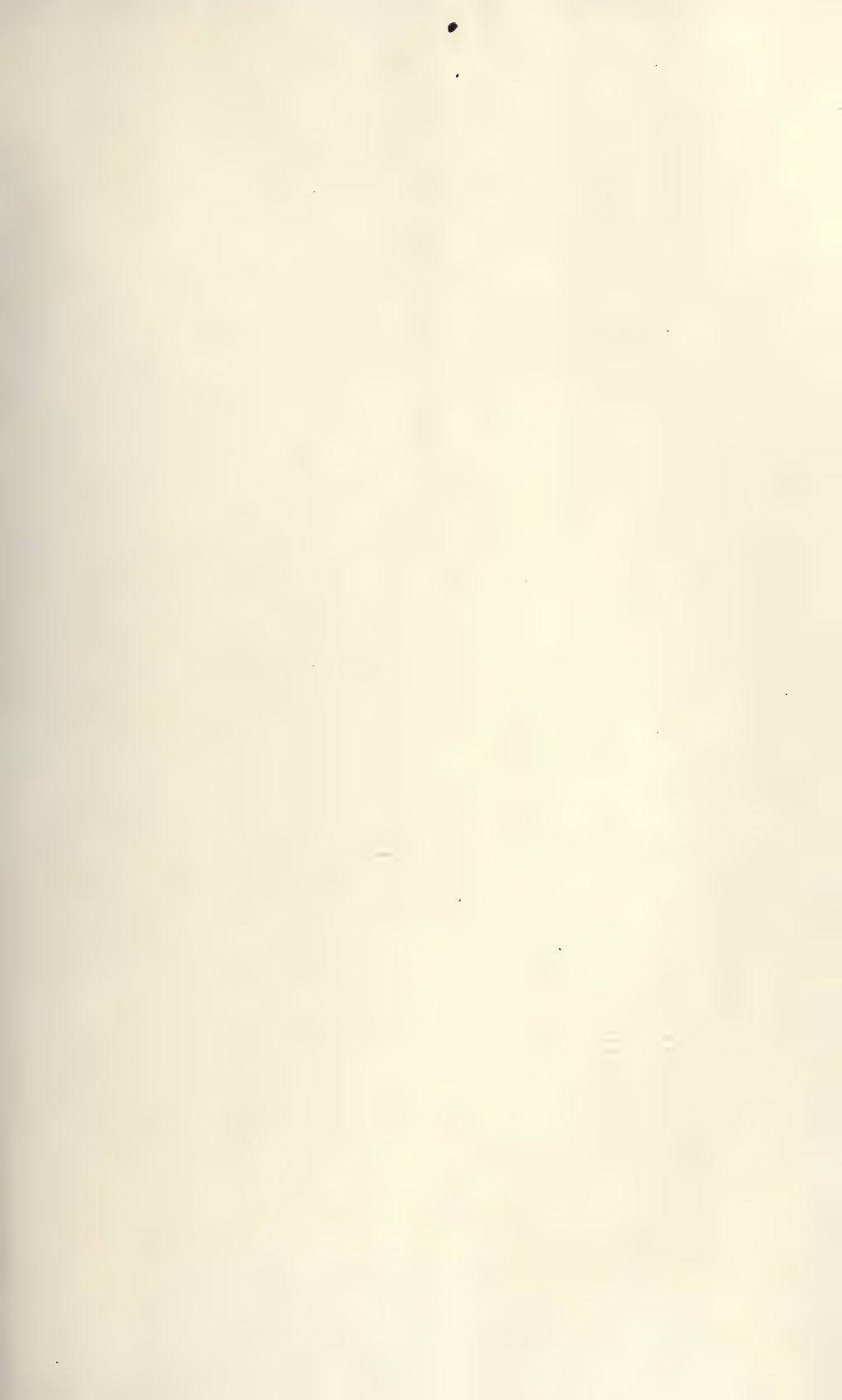
ESSENTIALS OF THE LAW. Vol. I. Blackstone. By Marshall D. Ewell. Second Edition. Albany, N. Y.: Matthew Bender and Company. 1915. pp. xvi, 867.

LEADING CASES IN CANADIAN CONSTITUTIONAL LAW. By A. H. F. Lefroy. Toronto: The Carswell Company, Ltd. 1914. pp. xxi, 112.

NAVAL AND MILITARY DESPATCHES RELATING TO OPERATIONS IN THE WAR. London: Darling and Son, Ltd. 1914. pp. 89.

THE ILLEGALITY OF THE TRIAL OF JESUS. By Hon. John E. Richards. **THE LEGALITY OF THE TRIAL OF JESUS.** By S. Srinivasa Aiyar. New Orleans: Charles E. George. 1914. pp. 92.

JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS. By John C. Rose. Baltimore: King Brothers. 1915. pp. xxx, 406.



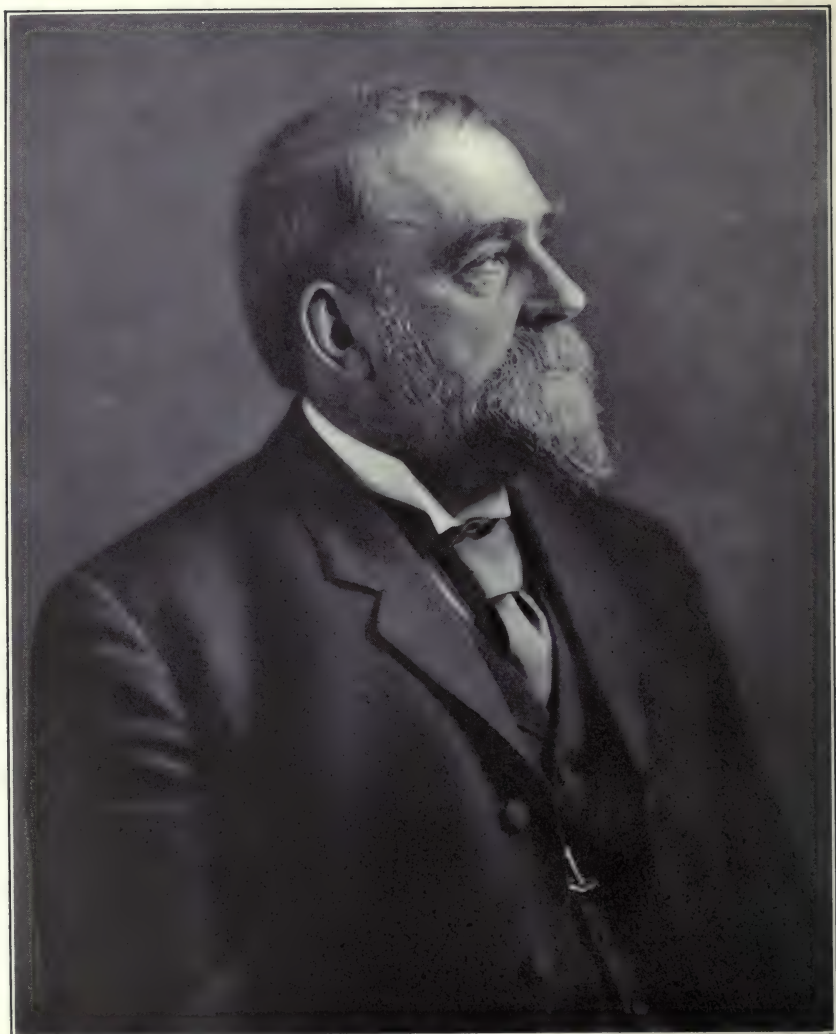


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John C. Gray

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JOHN CHIPMAN GRAY

JOHN CHIPMAN GRAY, Royall Professor Emeritus, died at Boston on February 25, 1915. He was born at Brighton, July 14, 1839, the son of Horace and Sarah Russell (Gardner) Gray, and after attending the Boston Latin School he graduated from Harvard College in 1859 and from the Law School in 1861. He studied for a third year at the Law School, received his A.M. in 1862, and immediately enlisted in the army, remaining until the end of the war. During his service he was Second Lieutenant in the Forty-first Massachusetts Infantry and the Third Massachusetts Cavalry, aid to General Gordon, and Major and Judge Advocate General of United States Volunteers on the staffs of General Foster and General Gillmore.

After the war he came back to Boston and took up practice, forming a partnership with John C. Ropes, an old friend and classmate in the Law School. Later, by the addition of William Caleb Loring (now Mr. Justice Loring of the Supreme Judicial Court), the firm became Ropes, Gray and Loring; and at the time of Mr. Gray's death it included, under the name of Ropes, Gray, Boyden and Perkins, eight of his former pupils, among them his son Roland, who graduated with distinction from College in 1895 and the Law School in 1898.

"He married in 1873 Anna Lyman Mason, a granddaughter of Jeremiah Mason."

His teaching work at the Law School began in 1869, before Dean

Langdell came from practice to the School. He was first appointed as lecturer, and this appointment was renewed in 1871 and again in 1872 and 1873. On March 18, 1875, he was made Story Professor of Law, and on November 12, 1883, Royall Professor of Law. He resigned on February 1, 1913, and became Royall Professor Emeritus. His term of service thus covered the whole development of the modern school, and every member of the present Faculty came under his instruction. He taught many subjects,—Bankruptcy and the Law of the Federal Courts, Conflict of Laws, Evidence, Constitutional Law, all branches of the law of Property, and Jurisprudence.

"With Mr. Ropes he edited the *American Law Review* for several years beginning with its foundation in 1866." Thereafter he published several treatises of distinguished excellence. The first edition of his "Restraints on the Alienation of Property" was published in 1883, the second in 1895. The "Rule against Perpetuities" had three editions, in 1886, 1906, and 1915. Each was carefully rewritten, the third during the last two years of Mr. Gray's life. "The Nature and Sources of the Law," embodying the substance of lectures delivered at Harvard and Columbia, was published in 1909. He also published two editions of his collected "Cases on Property" in six volumes, beside articles in magazines and other writings.

His honors and responsibilities, public and private, were many. He was made Doctor of Laws by Yale in 1894, and Harvard in 1895; he was President of the Harvard Alumni Association; and he was a Trustee of the Museum of Fine Arts and of many great public and private trusts.

Mr. Gray's life had many sides. Two especially concern the Law School,—his work as a writer and a teacher.

His plans for writing were stated in a letter to a friend not long before his death, with characteristic modesty and grace of phrase:

"Some fifty years ago I determined that I would do two things; first, write a book on the Rule against Perpetuities, which should be a model text-book; and secondly, write something on analytical jurisprudence; and I have had these objects in mind ever since. Of course, the cares of the world and the deceitfulness of riches and the lust of other things have choked the 'word,' but they have not entirely destroyed it. I may say that I have pursued at eve what I pursued at morn."

His idea of a "model text-book" may be gathered from the preface to the "Rule against Perpetuities:"

"Such a book should deal with the whole of its subject, its history, its relation to other parts of the law, its present condition, the general principles which have been evolved and the errors which have been eliminated in its development, and the defects which still mar its logical symmetry, or, what is of vastly greater moment, lessen its value as a guide to conduct."

This nice balance of different elements illustrates the sense of proportion which was so conspicuous in Mr. Gray. Writing when the spirit of the time gave a great scholar like him every excuse for overweighting the historical side, he valued his scholarship only as it could serve the needs of his fellowmen. Adequate and illuminating as was his historical matter, it was always subordinated to his main end. Especially he never lost sight of the importance of order and system. As he once said in defending an author whose power of analysis helped atone for the weakness of his history, "Though God did not have Gray's Botany or Dana's Mineralogy beside him when he made the world, and even though they are not the cloudless mirror of the divine idea, yet they are useful to weak mortals."

Among the qualities which have given his work its place with the best law books in the language is his conciseness. Without making the attempt, it is hard to realize the skill needed to attain such lucidity and completeness in so small a compass. Any one can write a long book; short books like Mr. Gray's mean the life-long toil of a master. He knew the truth in Stevenson's exclamation: "There is but one art,— to omit. A man who knew how to omit would make an Iliad of a daily paper."

Another feature of his writings is what his half brother, Mr. Justice Gray, once called, in speaking of another, "that clearness of statement which was the result of clearness of apprehension." This is well shown in his treatment of analytical jurisprudence,— a subject in which a writer's head is so soon lost in the clouds that it is hard for him to keep his feet on the ground, much less follow a straight path and avoid the pitfalls of profitless logomachy and muddled abstraction. To Mr. Gray's common sense and clean-cutting mind these dangers were only a challenge, and throughout "The Nature and Sources of the Law" he unflinchingly puts his deep-

est thought to the test of reality. The illustrations from the camp, the field, or the dinner-table which light up its pages happily distinguish it from other writings of its kind.

A distinguished style, spoken or written, was the natural product of a mind with the power to master his amazing learning without letting it master him. The world's best literature had become a part of him; and his reading seemed to include every time and every subject. Its range was little realized even by his friends. Those who knew how deeply read he was in theology might not suspect that exercises in the higher mathematics were a recreation of his summer holiday, or that the classics attracted him no less. I remember coming upon him one summer evening while he was entertaining his leisure with the *Odyssey*, and in answer to my questions I found that he was going through it for at least the third time. The classic training that enabled him to handle his Greek so lightly no doubt had much to do with the terse elegance of his diction; but it came also from the directness of his character. His hatred of sham or pretence in any form, his perfect lack of affectation or pose, even to himself, combined with his bright intelligence to produce an intellectual honesty that matched the soundness of his moral fibre. Small wonder, then, in these days of labored epigram, of slovenly and self-conscious attempts at distinction made to order, how telling was his plain English, used for no purpose except to express exactly an exact thought. Rigidly as he avoided conscious ornament, he could not escape the allusions and classic turns of phrase which sprang of themselves from a soil so cultivated. The grace and power of his style, as well as his habit of thought, are well shown in the attack in the preface to the "Restraints on Alienation" (second edition) upon doctrines offensive to his uncompromising sense of honesty. His discussion of teaching methods in 1 *Yale Law Journal*, 159, is another good specimen of his work.

Such qualities as these were bound to tell in his teaching. The daily intimacy of the classroom, under a system which keeps the instructor under fire and exhibits him in action, leaves nothing unrevealed. Weakness of intellect or character becomes as evident as tricks of manner. By the same token contact with a fine legal mind seeking nothing but the truth was a legal education and something more. His scorn of pedantry, his freedom from the least touch of self-consciousness, brought moral as well as intellectual stimulus.

He treated his pupils as fellow-students, working with him on an equal footing to get at the truth. By so doing he brought before them most effectively the vastness of the law, and he made this very thought, so apt to discourage a beginner, a source of inspiration; for as the student had long since learned that Mr. Gray could stoop to no pose, he was excited by the sense of really helping his master. He had other special gifts, too, to help him as a teacher. He understood men,—no doubt because of his own direct and manly nature. And he had a wonderfully swift and smoothly working mind. Among the teacher's pitfalls is the danger that after long reflection he can see the thing in only one way. His thought thus hardens into a rigid outline, and his very learning may increase his difficulty in dealing with a beginner who comes at the matter from an unexpected and unlaywerlike angle. The flexibility with which Mr. Gray met his questioner's mind, his interest in doing so, the ease and directness with which he followed out a new line of reasoning to a fruitful conclusion, make him a unique figure in the memory of thousands of grateful pupils. And their indebtedness to him is manifold. One of them, at least, found in a few words of parting advice to the third-year class more help than in any other single experience in the Law School.

Among all their memories of Mr. Gray the most grateful to his old students will be his affection for them. This was one of the great feelings of his life. Although he continued to practise while he taught (a thing made possible by what he described as his "very peculiar and very fortunate" relations with his partners, and his not less fortunate and peculiar mental gifts and methods of work), he always put the Law School first, and more than once thought of giving up practice for the same reasons which led him to decline the highest judicial office. The sign that told him it was time to give up teaching after more than forty years was that it was no longer a regret to reach the end of the teaching hour. What that hour had always meant before is best told in his farewell letter to his last class: "Property 3 has been a perpetual delight to me, never wearisome. I have always felt that on both sides it was not an attempt to show how much we knew, or how smart we were, but that we were fellow-students trying to get to the bottom of a difficult subject." These were the words of one whose restraints of conscience and temperament made it impossible to go in

expression a hair's breadth beyond the line of his exact feeling; and they find in the hearts of his pupils the same response as did the dedication of his book "to his old pupils, whose affectionate regard has been to him a life-long blessing, from their grateful master."

Ezra Ripley Thayer.

Dean Thayer's sketch of Mr. Gray makes it unnecessary for me to put in writing much that would naturally come to my mind, for Gray's learning, versatility, charm of manner, expression and character must have struck all with whom he came in contact as they have struck Dean Thayer. In adding a few words I can only hope by repetition and illustration to emphasize some of our colleague's characteristics, not to change or even add much to what the Dean has said.

When Gray died there passed from among us a man whose type has always been rare and is growing rarer. It is so difficult to achieve excellence even in one department that the old ideal of a rounded life and a broad intellectual outlook has been almost surrendered by men of serious purpose, as inconsistent with any plan for real accomplishment. Gray, however, found no inconsistency. He was at once a specialist in a narrow and difficult branch of the law, a lawyer in general practice, a man of affairs, a teacher, a writer, a well-read scholar in various fields with cultivated interests in letters and art and a man of the world by no means averse to mingling in congenial society.

I first met him in 1885, when I entered the Law School as a student, and the impression of his teaching is still fresh in my mind. He had in speaking, as in writing, the same excellent style, an easy, flowing, clear expression of his ideas, without preciosity or study for effect, yet by no means wanting in occasional verbal felicities. He taught in those years as he did thereafter, until the death of Professor Thayer in 1902, the Law of Property, — mainly Real Property. The topic seemed congenial to him and he made it interesting to the class. His courses were valued, and zealous preparation made for them. The first edition of his treatise on "Perpe-

tuities" was published while I was in the School and was received with much enthusiasm by the students. His little book on "Restraints on Alienation" had already been published.

When not teaching, most of the professors were withdrawn in the library stack, where students in those days did not much venture. Gray, however, sat at a large table in an alcove opening out of the students' reading-room. This fact and his friendly and helpful ways made him much resorted to by the students. Though he was actively engaged in practice in Boston, he generally spent four days of each week at the School. Much of the time while he was there I suppose he was working on business of his office. His partners doubtless enabled him to specialize his own work, so that much of it could be done in Cambridge.

An anecdote told me by a colleague relating to an incident, which occurred about this time, is worth preserving as showing Gray's interest in his students and his ability to give in a few words the necessary help.

One Christmas vacation a young student from the west, who was detained at the Law School during vacation because of his distance from home, was seeking to get an introduction to the Roman Law, though it was not a part of the school curriculum. With this in mind, he was reading Mackenzie's book on the subject. Gray, passing by, caught a glimpse of the title of the book, stopped and said simply, "Don't read that." The student replied, "What shall I read?" Gray inquired, "Do you read German?" and the student answering that he had some slight knowledge of the language, Gray went into the stack, secured a copy of Sohm's "Institutes," which had then recently appeared in German and had not been translated, set it down before the student, saying, "Read that," and went about his work. These few words were instrumental in giving a beginner a proper starting point for years of study of the Roman Law.

When I became a member of the law faculty in 1890 I met Gray, of course, more frequently and on a somewhat different footing, but he was always the same. His common sense was so great that one did not always appreciate how uncommon it was. He was never wordy or vague, and though generally having a clear idea of his own on a matter in hand, was by no means inhospitable to the ideas of others. His methods of work were admirable. He seemed never

in a hurry, but always making steady progress with whatever he had before him. His wonderful physique enabled him to pursue successfully his varied activities. After he retired from teaching in 1913 he told me that until he had passed the age of seventy he never saw any occasion to change the habits of life which he had formed at thirty; that he had been able to work as he liked, eat as he liked, smoke as he liked and go to bed only when he chose. A reasonable temperance doubtless guided him in these matters, but he certainly could and did frequently, if not habitually, work all day and read literature which was not generally of the lightest variety during a long evening.

At the death of Professor Thayer in 1902, Gray, while retaining his advanced course on Property, dropped his other two courses and took up the subjects of Evidence and of Constitutional Law, which Thayer had made his own. This change from his own specialty to another man's shows Gray's persistent desire for a broad field of knowledge. He was past sixty at the time, an age when most men are content to remain in the grooves they have worn for themselves. It was especially remarkable, since Gray's activities in Boston were increasing rather than diminishing. Ropes had died, and Loring had gone on the Supreme bench, and more heavy trusts had come into Gray's hands. Another striking illustration of the same tireless search for knowledge is his attendance eight years later on a course in Roman Law given by a junior colleague, — the same man to whom Gray had recommended Sohm's "Institutes," twenty years before. With all his activities, Gray carried out what he undertook. His judgment of his own capacity and possibilities was as sound as if he had been gauging another's, and wide as was the orbit in which he moved, it was justly calculated.

Shortly after Professor Thayer's death, a portrait of him was presented to the Law School, and Gray received it on behalf of the School. In the course of the few remarks he made upon the occasion he spoke somewhat as follows: "There is an old saying that 'manners makyth man,' and I have always thought that Professor Thayer had the best manners of any man I have ever known. He would have been at his ease if sitting at table between the Pope of Rome and the Czar of all the Russias, and he was equally at his ease in talking with the shyest of young men without condescension and without strained familiarity."

What Gray truly and gracefully said of his colleague might equally well have been said of himself. His simple, direct, and kindly manner was the same to everybody, and the form and substance of his speech was fit for any company. His large tolerance also makes his added words of Thayer applicable to himself.

"He was the best type of a New Englander, without the creaking of the joints that sometimes marks and mars that estimable personage. It has been said that the difference between a good Bostonian and a good Philadelphian is that the Bostonian thinks everything wrong that is not right, and the Philadelphian thinks everything right that is not wrong. In this matter, Mr. Thayer was of the Philadelphian school."

Though his success in the world of affairs, great as it was, might undoubtedly have been vastly increased had he given his whole time to practical matters, he never seems to have even considered surrendering his professorship. In the last conversation I had with him he said: "I cannot imagine any more delightful work than teaching intelligent young men things which you know and which they do not know but desire to know."

Early in the year 1913 he had a sharp illness, and never regained his physical strength, though his mind remained clear and active till the end. To many men who have enjoyed robust health and great capacity for work the sudden deprivation of these accustomed blessings comes with such crushing force as to be almost insupportable. Gray, however, showed the same calm philosophy which was characteristic of him throughout his life. To one who ventured a few words of sympathy for his lessened activity, he replied merely, "It is wonderful how the back accommodates itself to the burden."

The last time I saw him was but a few weeks before his death. He had then for months been unable to get about much, and except for a drive on pleasant days was mostly confined to his room. His manner, however, was the same as ever, his intellectual interests as keen; he was planning a little further revision of his lectures on Jurisprudence. He said nothing of his disabilities, nor betrayed by manner or expression that his lot had become a hard one. The courage he showed in the Civil War half a century before did not desert him.

Samuel Williston.

A typical man of law, on whose face wisdom, judgment, probity were joined with good sense, coolness and logical precision; this was Gray as we saw him first in the professor's chair, and we never needed to revise this impression. The qualities that further acquaintance showed us were the qualities of the man, — courtesy, kindness, wit, consideration for others.

In those days, when Austin Hall was still very new, Gray had not yet accepted the study of cases as the basis of instruction. He gave out weekly a list of authorities to be consulted, and then in class lectured to us with a clearness, precision, and perfection of form that was all his own. His mind was well adapted to teaching law in this way: his sense of form and proportion, his skill in exposition, his certainty of using just the right word, made even *Formedon in Reverter* and the Statute of Uses as interesting as Ashwell's case or the "last clear chance." During the first ten minutes of a lecture he was in the habit of giving a summary of the preceding lecture, and these summaries were far from the least instructive parts of his lectures. It is hard to see how his method of instruction could have been improved by the use of a case book, though he himself was already coming to believe that the use of a case book was the only satisfactory method of study from the student's point of view. A few years later he prepared his own series of books, and he became one of the most vigorous and effective defenders of Langdell's system of instruction.

Probably his most striking characteristic as a lawyer and teacher of law was the authority with which he spoke. It never occurred to any of his students that there could be a doubt about his conclusions. His partner Ropes is reported to have said that "John Gray's mind is a logical machine; you put your facts in the hopper and the correct legal conclusion will come out." In his latter days, at least, more than one court of supreme jurisdiction seemed to hang upon his words with the same sense of conviction as if it had been his class in Property. His counsel was sought in all sorts of affairs. Testators and clergy accused of heresy, cotton mills and colleges, millionaires and poor widows in trouble, came to him for advice, and his opinion seldom proved wrong. It used to be said of his "Restraints on Alienation" that Gray lost a case and wrote a book to prove that the court erred. He perhaps lost other cases; *sed quære*.

The exact precision of his mental processes was illustrated in his lectures. Year after year he began and ended in precisely the same place. One mark in his case book served to mark the stopping place of each lecture, though he used the book for fifteen years. He lectured for two years, in the early seventies, on the Conflict of Laws. The manuscript of his lectures, written in his neat fine handwriting and tied with a blue ribbon, was marked at the end of each day's work, and the marks for the two years were the same.

He never seemed to us very young, and he never seemed to grow old. He lived to be the connecting link between the older faculty and the younger. The beginning of his service antedated by more than a score of years that of any of his colleagues. He had been the teacher of us all. Yet he had no characteristic of the last leaf. Though his voice was weaker, and his step had begun to halt, he was as wise and intellectually as virile in the last year of his service as in his first. As Dean Thayer has elsewhere called him, in noble phrase, he was "a rock of trust."

The characteristic of him that most clings in the memory, after all, is virility, — power of mind, power of body, power of character. There were giants in his generation; and about each of his qualities there was something immensely human. He was a man, and his like, take him for all in all, we shall never see.

Joseph H. Beale.

CONTRACTUAL LIMITATION OF LIABILITY FOR NEGLIGENCE

THE method of growth of the common law, by which its different branches are evolved somewhat independently, and with no specific relation to other branches, does not invite discussion of abstract questions which may have a like bearing in two or more of these independent branches. But the common-law method of reasoning by analogy and the practice of seeking assistance in the solution of questions pertaining to one branch of the law by adopting reasoning which has been applied in the solution of questions more or less similar in other branches, justify the ultimate search for a guiding principle not peculiar to any one legal division when analogous considerations have been taken into account in different divisions for the solution of somewhat similar questions. It may be that in course of time a large number of principles recognized as common in different divisions of the law will thus be differentiated from the mass of the aggregate law to form the framework for a statement of its ruling principles. Such an aggregation of abstract principles subjected to some formal arrangement might be given the rather pretentious title of general "jurisprudence,"—pretentious for the reason that in fact it would furnish a reliable guide for the solution of but few of the actual controversies which would be presented to the courts for decision. Such a possibility hardly justifies the hope that the body of the law can ever be reduced to a strictly scientific arrangement, for such arrangement is constantly being interfered with by change in the relative potency of the forces which are molding it. Perhaps not much more can be hoped for than that a somewhat wider generalization than that now deemed admissible may be resorted to in the solution of some of the problems involved in the adjudication of cases arising in particular branches of the law.

It is scarcely imaginable that any Roman jurisconsult ever had propounded to him the question whether tort liability could be modified or affected by preceding contractual agreement; for a Roman jurisconsult would have been totally unable, from his point of view as to the nature and content of the law, to understand either

our present notions of tort liability or our current theories as to contractual obligations. Nevertheless the abstract question now propounded is of a kind which might have interested a jurisconsult more deeply than it is likely to interest the student who for the time being is giving his specific attention to particular topics of our law. However this may be, the attempt to make a cross section through several legal shoots, so to speak, may prove interesting at least to the extent that some common pattern is discoverable.

It is as impossible as it is undesirable to reason about such a question without starting with the particular conclusions reached in deciding groups of cases which must be relied on as to the logical antecedents of the generalizations which are to be made, for it is characteristic of legal reasoning that it necessarily involves an exercise of judgment as to the weight to be given to counter-vailing analogies. The aggregate judgment of many minds dealing with similar questions with the common object of reaching the best attainable result will unconsciously be influenced by sociological considerations, and thus the law will adapt itself in form and substance to the conceptions of right and justice which prevail in the social organization of which it is the natural product. This unconscious adaptation through natural growth will probably be more effectual in the long run in keeping the law subservient to the fundamental needs of the social organization than any conscious attempt to readjust it to meet the particular emergencies real or imaginary which any rapid change in social conditions may seem to demand. At any rate there is always the possibility of resort to specific legislation to adapt it more rapidly to such changes of condition. Experience, however, seems to indicate that legislation is an awkward tool in that it lacks the valuable feature of aggregate judgment based on many specific instances which is of great weight in the process of reasoning by countervailing analogies.

The branch of the law furnishing the aptest material for the construction of an abstract rule as to validity of contractual limitations of liability for negligence is that of carriers of goods and passengers. The treatment together of carriage of goods and carriage of passengers, the one involving a bailment, the other constituting a portion of the personal services which one man may undertake to render to another, finds its justification only in the fact of a common conception of public calling,—a conception in it-

self due wholly to sociological considerations and, as applied in the law, rather anomalous. But the common-calling feature has so potently affected the particular conclusions reached within the scope of this branch of the law that it may well be found to furnish the explanation of many distinctions which would otherwise seem artificial.

A rule peculiar to our system of law as distinct from the civil law in relation to the carriage of goods, that the public carrier is absolutely liable for all loss not due to an act of God or the public enemy (as the rule somewhat crudely was stated when first formulated), naturally gave rise almost at once to the practical question whether the common carrier undertaking to discharge his public functions in a particular case might nevertheless by agreement with the shipper be relieved in some measure from this extraordinary liability. And at first no reason seemed to suggest itself why the parties to the transaction might not by an agreement fairly entered into affect the measure of the common carrier's responsibility. The difficulty encountered in particular cases was to determine what constituted an agreement that in the particular case the liability of the carrier should be less than that otherwise fixed by the rule of law.

In the English courts various considerations resulted in the general acceptance of the conclusion that by reasonable notice the carrier might thus limit his liability, although there was a continuing protest against the lessening of a responsibility which it was insisted had originally been recognized on broad reasons of public policy dictated by the nature of the relation which the public carrier has assumed towards society.¹ The English courts in giving consideration to the argument that the carrier was misled by the shipper who, failing to respond to the requirements of a notice calling upon him to state any exceptional value of the package, had practically committed a fraud upon the carrier which should deprive him of any redress, were nevertheless already disturbed by the practical consequence that in recognizing the exemption from liability by the giving of notice, they were enabling the carrier to practically exempt himself from liability even for negligence where the shipper chose for reasons sufficient for himself to omit a declaration of exceptional value. But they seem to have contented

¹ *Harris v. Packwood*, 3 Taunt. 264 (1810); *Sleat v. Fagg*, 5 B. & Ald. 342 (1822); *Batson v. Donovan*, 4 B. & Ald. 21 (1820); *Riley v. Horne*, 5 Bing. 217 (1828).

themselves with the exclusion from the benefit of their rule of a carrier which had been guilty of gross negligence or misfeasance occasioning the loss, and the holding of such carrier liable for the entire value of the package notwithstanding the failure of the shipper in response to the requirements of a reasonable notice to disclose such value to the carrier.²

The English courts had assumed in their decisions as to the effect of notice, that the parties to a contract for transportation were at liberty to enter into an agreement as to the extent of the carrier's liability, made by the carrier specially accepting the goods for transportation on conditions different from those imposed by law in the absence of agreement, and they had assumed that the shipper in effect assented to terms of shipment stated by the carrier of which he had reasonable notice if he tendered his goods for shipment without objection to such stipulations; and this was the assumption of the English courts which was first dissented from in the American courts to which similar questions were submitted. It is to be borne in mind in explanation of the readiness with which the American courts reëxamined the whole question of the validity of limitations on carrier's liability that these questions had not arisen in England, or at any rate had not reached any definite solution there until after Independence, so that the conclusions of the English courts had no such antiquity as to justify their being regarded as a part of the common law accepted in this country.³ The public-service feature of the carrier's business had become more prominent by reason of the introduction of transportation by vehicles operated by steam power resulting in an enormous extension of such business and its concentration in the hands of corporations by whom the general introduction of limitation of liability by notice had been resorted to. It was not unreasonable, therefore, that in the face of these changed conditions the American courts should reach the conclusion that no mere general notice should be assumed to have been assented to by the shipper as against his right to have his goods carried in accordance with the common-law rule of the carrier's extraordinary liability.⁴

² *Sleat v. Fagg*, 5 B. & Ald. 342 (1822).

³ *Fish v. Chapman*, 2 Kelly (Ga.) 349 (1847).

⁴ *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234 (1838); *Moses v. Boston & Maine R. Co.*, 24 N. H. 71 (1851); *Jones v. Voorhees*, 10 Oh. St. 145 (1840).

But in connection with the question as to the policy of permitting a carrier to limit his liability by notice, even though brought home to the shipper before shipment had been made, arose at once the further question whether limitation of the strict rule of common-law liability was not against public policy and therefore invalid; for the recognition in England of special acceptances had been unquestioned, although there had been a constant difference of opinion among the judges as to the soundness of the rule permitting limitation by notice; and here again there was a substantial repudiation in America of the views of the English courts, it being insisted that as the strict liability of the carrier was a rule of public policy, a contract limiting it was against public policy. This was the broad position taken by the Supreme Court of New York in *Gould v. Hill*⁵ and in early cases in Pennsylvania.⁶ On the other hand there was a strong inclination to hold that the shipper was competent to make any arrangement he saw fit as to the extent of the liability assumed by the carrier with the suggestion that no question of public policy was involved in the making of such a contract.⁷ According to this view the shipper might, if he saw fit, by contract relieve the carrier of the obligation of his public calling and treat him as a private carrier.⁸ This line of argument was sufficiently persuasive to induce the Supreme Court of New York to abandon its first announcement in *Gould v. Hill*, *supra*, and to sustain contracts by which the carrier was relieved from liability for loss by fire,⁹ or even apparently relieving the carrier from liability by a stipulation that the shipment should be at the owner's risk;¹⁰ and the Court of Appeals of New York sustained the validity of such a contract exempting the carrier from all liability save for negligence.¹¹

Without citing the innumerable cases constituting the great preponderance of authority in this country, in which it is held that a contract limiting the carrier's liability is not valid if it relieves him from the consequences of negligence, it is interesting to note a peculiar doctrine arrived at in New York, and perhaps not

⁵ 2 Hill (N. Y.) 623 (1842).

⁶ Beckman v. Shouse, 5 Rawle (Pa.) 179 (1835).

⁷ New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344 (1848).

⁸ Kimball v. Rutland & Burlington R. Co., 26 Vt. 247 (1854).

⁹ Parsons v. Monteath, 13 Barb. (N. Y.) 353 (1851).

¹⁰ Moore v. Evans, 14 Barb. (N. Y.) 524 (1852).

¹¹ Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485 (1854).

elsewhere, that the public policy which vitiates the limitation of liability for negligence does not extend far enough to defeat a contract limiting the carrier's liability for negligence of servants.¹² No explanation of this curious rule of public policy seems imaginable save that of survival of some unconscious, or at any rate unexpressed, conception of limitation of bailment liability by which the bailee had freed himself from any other duty than that of procuring a service to be performed by someone else; for plainly a bailee, as distinct from one undertaking to procure service for another, must under every principle of policy be chargeable for the faults of his servant, and unless he may contract against his own negligence he cannot contract against that of servants engaged for him in the performance of the duty undertaken, whatever it may be.

Another anomaly creeping into the law as to limitation of carrier's liability was that of a distinction between negligence for which it was assumed the carrier might be relieved by contract, and some kind of fault or misfeasance called gross negligence from which a contract exemption would afford him no protection.¹³ The difficulty of distinguishing between gross negligence or wilfulness on the part of the carrier or a servant from the consequences of which the carrier cannot be relieved by contract, and that ordinary negligence which Illinois, like New York, assumes to be

¹² *Mynard v. Syracuse, etc. R. Co.*, 71 N. Y. 180 (1877); *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442 (1862). But this rule, although sanctioned by a long line of cases in which it had been more often assumed or distinguished than directly applied, was questioned as to its soundness in *Nicholas v. New York Cent. & H. R. R. Co.*, 89 N. Y. 370, 373 (1882), in which it is said that "a contract exempting a bailee for hire from the obligation of care on his part, in respect to the goods in his custody, is, to say the least, unreasonable, and, while the law does not go to the extent of making it void on that ground, yet the qualification that to have that effect it must be plainly and distinctly expressed, so that it cannot be misunderstood by the shipper, is so obviously just, in view of the methods of business, and the want of knowledge of the force and construction of contracts on the part of the great mass of persons dealing with the transportation lines of the country, that it ought not to be relaxed."

¹³ *Chicago & N. W. Ry. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417 (1890). The rule thus recognized was originally stated in Illinois in this language: "We think the rule a good one, as established in England and in this country, that railroad companies have a right to restrict their liability as common carriers, by such contracts as may be agreed upon specially, they still remaining liable for gross negligence or wilful misfeasance, against which good morals and public policy forbid that they should be permitted to stipulate." *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136, 141 (1857).

subject to contractual waiver is so difficult of statement that its reasonableness is from that fact seriously impugned. Something more evidently is meant than the gross negligence which consists in failure to exercise slight care where slight care only is required of the bailee under the classification which Lord Holt attempted so unsuccessfully, save for purposes of confusion, to import into the law of England from the civil law, and which Baron Rolfe was driven to describe as nothing but negligence "with the addition of a vituperative epithet."¹⁴ It would no doubt be safe to limit the gross negligence on the part of a servant, against which, according to the Illinois cases, the carrier cannot contract, to misfeasance or wilfulness, excluding mere inadvertence or inattention however great, save as wilfulness may be inferred therefrom as a matter of fact.¹⁵

Another illustration drawn from carriers-of-goods cases of the difficulty arising in attempting to answer the question as to the validity of contractual limitations of liability is furnished by the conflict of authorities as to whether an agreed valuation is effectual to limit recovery for a loss by negligence. Leaving out of view the cases of fraudulent misrepresentation on the one hand in which the carrier has been misled into accepting for transportation articles of exceptional value which would not have been accepted as within the nature and scope of his business, or would have been accepted only with extra precautions for safety for which a higher charge would have been made if the nature of the contract had been understood;¹⁶ and also cases where the shipper has been given no real opportunity to have his goods transported otherwise than under a condition limiting his recovery in case of loss to a stipulated sum,¹⁷ — there is a really perplexing question as to the validity of a contract in

¹⁴ *Wilson v. Brett*, 11 M. & W. 113, 115 (1843).

¹⁵ No doubt the Illinois court assumed that it was stating the English rule, but a reference to the English cases indicates that in prohibiting limitation by notice of liability for gross negligence the English courts meant merely to announce what is the almost universally recognized rule in this country, that as against gross negligence no notice of limitation of liability is effectual. *Wyld v. Pickford*, 8 M. & W. 443, 461 (1841). This interpretation is put on the English cases by Judge Story in *Tracy v. Wood*, 3 Mas. (U. S.) 132 (1822).

¹⁶ The typical case is that of a shipment of money concealed in a nail bag filled with hay. *Gibbon v. Paynton*, 4 Burr. 2298 (1769).

¹⁷ *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 343, 4 S. W. 689 (1887).

which the rate of carriage is fixed in accordance with the risk assumed by the carrier; that is, a contract in which for the consideration of a lower rate the shipper agrees that the value for which the carrier shall be held liable is in fact less than the real value of the goods. If the loss is due to negligence, this contract is in effect a limitation of liability for negligence and considered from that point of view it ought to be invalid, and many courts have so held.¹⁸ But the view approved by what is no doubt the greater weight of authority is that following the analogy of the fraud cases, the shipper is estopped, after putting a valuation on his goods which must necessarily affect the care which the carrier will exercise in their transportation, from claiming that they are of greater value than represented.¹⁹ On the theory of these cases the agreed valuation is not a contract against liability for negligence, although its effect is to exempt the carrier from liability for that cause beyond the agreed valuation; therefore a state statute forbidding contractual limitation of carrier's liability does not render invalid such an agreement.²⁰ But under the language of many state statutes prohibiting any contract affecting the carrier's liability, it is plain that the agreed valuation stipulation is invalid;²¹ hence the recent decisions of the Supreme Court of the United States giving to the Carmack Amendment the effect of nullifying all state statutes which restrict contractual limitations on the carrier's liability so far as interstate commerce is concerned are of vital importance;²² for as to interstate commerce these cases sustain uniformly throughout the states, regardless of statutes, the validity of stipulations as to agreed valuation even as to negligence.

¹⁸ *United States Express Co. v. Backman*, 28 Oh. St. 144 (1875); *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. 244 (1882); *Moulton v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 85, 16 N. W. 497 (1883); *Railway Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311 (1890); *Georgia R. & B. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287 (1894); *Everett v. Railroad*, 138 N. C. 68, 50 S. E. 557 (1905).

¹⁹ *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33 (1884); *Hart v. Pennsylvania R. Co.*, 112 U. S. 331 (1884); *Ballou v. Earle*, 17 R. I. 441, 22 Atl. 1113 (1891); *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870 (1892); *Donlon v. Southern Pacific Co.*, 151 Cal. 763, 91 Pac. 603 (1907).

²⁰ *Donlon v. Southern Pacific Co.*, 151 Cal. 763, 91 Pac. 603 (1907).

²¹ *Lucas v. Burlington, C. R. & N. Ry. Co.*, 112 Ia. 594, 84 N. W. 673 (1900); *St. Louis & S. F. Ry. Co. v. Sherlock*, 59 Kan. 23, 51 Pac. 899 (1898).

²² *Adams Express Co. v. Croninger*, 226 U. S. 491 (1913); *Missouri, Kan. & Tex. R. Co. v. Harriman*, 227 U. S. 657 (1913); *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97 (1914); *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173 (1914).

In the attempt to ascertain the considerations of public policy relied upon in reaching a conclusion one way or the other in carriers-of-goods cases as to whether negligence not amounting to wilfulness or misconduct as a basis of liability may be waived by contract, it is easy to see that substantially two views have been entertained which are inconsistent. In accordance with one view, the common carrier may by contract reduce his liability to that of ordinary bailee, but even as ordinary bailee such limitation of liability does not relieve him as against negligence; while the other view finds it to be contrary to public policy to allow the common carrier who is in a situation of advantage with reference to his individual customer to avail himself of that advantage by making any contract for a relief from his common-law obligations. Considering this diversity of view only from the standpoint of carrier law, it must be admitted that the weight of authority is with the first, with the consequent result as bearing on the abstract question of limitation of liability for negligence in any bailment relation that such contract is against public policy. On the other hand, coming at the question from the viewpoint of general bailment obligation, the second solution would seem more reasonable, for the considerations of public policy in regard to the carrier only forbid his taking advantage of the situation to impose on his customer a limitation to the latter's disadvantage. This solution would not only be more satisfactory in simplifying the law of carrier's liability which otherwise is in a state of inexplicable confusion, but also in suggesting a more consistent result in regard to bailee liability in general where no question of public service is involved; for as negligence is after all only the failure to exercise the care required under the circumstances of the transaction and nothing more, it ought in reason to be open to the parties entering into an ordinary bailment relation to determine for themselves what care is to be expected of the bailee, and there can be no plausible reason suggested why, if the bailee does not fall short of the care to be expected of him, he should be subjected to liability on the ground of negligence.

Perhaps after all the question is one of definition rather than of substance. If the bailee is not negligent he is not liable, and what is usually spoken of as a contractual limitation of liability becomes only a question of contractual definition of duty. According to

this view, the question whether a bailee may by contract limit his liability for negligence would never arise.

In cases relating to passenger-carrier's liability, the validity of contracts exempting the carrier has been approached from a somewhat different angle than in the cases relating to common carriers of goods, for although such carrier is engaged in a public calling he nevertheless is not subjected to any extraordinary liability on that account. It is said that he must exercise the highest degree of care and diligence which human foresight can suggest for the safety of the passenger; but this is said because he employs the dangerous agencies of vehicles propelled by steam or other motive power involving extraordinary danger. It is doubtful whether any well considered case is to be found in which the degree of care required is held to be greater on account of the business in which the carrier is engaged being public rather than private.

As the liability of the carrier of passengers depends therefore solely on his negligence, the general question of the validity of contracts limiting liability for negligence seems to be squarely in issue in the passenger-carrier cases; but unfortunately there is here the same conflict in the decisions of the courts as has already appeared in cases relating to carriers of goods. The inclination seems to have been very strong to declare as a matter of public policy that no such contractual limitation is valid; and by the great preponderance of authority contractual limitation is repudiated wherever the carriage is in pursuance of an agreement or obligation assumed for any consideration of mutual benefit, even though the carriage of the person may be only incidental to some other purpose. Thus in the drover's-pass cases involving contracts by which live stock is transported with the privilege to the shipper of sending someone on the train to accompany the stock, it is generally held that notwithstanding stipulations in the contract to the contrary the carrier is liable for any injuries resulting to such person through the carrier's negligence, the leading case being that of *Railroad Co. v. Lockwood*,²³ in the Supreme Court of the United States. On analogous reasoning it has often been held that contracts exempting the carrier from liability in the case of mail agents,

²³ 17 Wall. (U.S.) 357 (1873.) Strong cases to the contrary are, however, numerous. For example, see *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315 (1865), and *Gallin v. London & N. W. R. Co.*, L. R. 10 Q. B. 212 (1875).

express messengers, and newsboys are invalid.²⁴ But a fuller discussion of cases of this character has resulted in a marked departure from the broad generalization in the Lockwood Case on the theory that as the passenger carrier is under no obligation in pursuance of his public calling to carry persons who pursue some business or occupation on the train, to whom transportation is merely incidental, a contract relieving the carrier from liability for injury to such persons, even through its own negligence or that of its servants, is valid;²⁵ and when the courts came finally to consider cases of absolutely gratuitous passage, that is, cases in which there was no consideration whatever to furnish an inducement to the carrier for transportation of a person who was allowed to ride as a mere privilege and not in consequence of any public-service obligation on the carrier's part, the conclusion was reached by a great weight of authority that a stipulation relieving the carrier from any liability whatever (unless it might be for gross negligence amounting practically to wilful injury) was valid.²⁶ The Supreme Court of the United States approves this rule, qualifying its own assertion in the Lockwood Case against any contractual limitation of liability for negligence.²⁷

If, then, there is any general rule to be deduced from the passenger cases it is that the public-service consideration alone prevents contractual limitation of liability for negligence.

²⁴ *Jones v. St. Louis S. W. Ry. Co.*, 125 Mo. 666, 28 S. W. 883 (1894); *Shannon's Adm'r v. Chesapeake & O. R. Co.*, 104 Va. 645, 52 S. E. 376 (1905); *Davis v. Chesapeake & O. R. Co.*, 29 Ky. L. R. 53, 92 S. W. 339 (1906).

²⁵ *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371 (1885); *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633 (1888); *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 652 (1892); *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069 (1894); *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, 55 N. E. 332 (1899); *Russell v. Pittsburg, etc. Ry. Co.*, 157 Ind. 305, 61 N. E. 678 (1901). The Supreme Court of the United States has approved this rule in *Baltimore, etc. R. Co. v. Voigt*, 176 U. S. 498 (1900). The Supreme Court of Illinois seems to have regarded the reasoning in these cases as so persuasive that it has abandoned its exception of gross negligence from contractual limitation of liability. *Chicago, R. I. & P. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705 (1905). But there are unqualified denials on the other hand of any validity of a limitation of liability for negligence even in the case of a purely gratuitous passenger. See *Jacobus v. St. Paul & C. Ry. Co.*, 20 Minn. 125 (1873).

²⁶ *Quimby v. Boston & Maine R. Co.*, 150 Mass. 365, 23 N. E. 205 (1890); *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46, 30 N. W. 282 (1886); *Muldoon v. Seattle City Ry. Co.*, 7 Wash. 528, 35 Pac. 422 (1893); *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539 (1900).

²⁷ *Northern Pacific R. Co. v. Adams*, 192 U. S. 440 (1904).

Telegraph companies are engaged in a public calling, though the nature of such calling does not involve liability on their part save for negligence, and it may be assumed that cases relating to the validity of contractual limitation of liability on the part of such companies will throw some light on the general question of limitation of liability for negligence. But unfortunately the courts seem to have failed to make the distinction which is made in cases of carriers of goods between a limitation by mere notice or regulation or condition and a limitation by express contract. Perhaps no such distinction has been practicable in view of the general requirement of such companies that messages be written on a blank, prepared for the purpose, on which express stipulations limiting liability are printed, so that it has been difficult for the sender to comply with regulations as to the method in which the message shall be submitted for transmission, without at the same time impliedly agreeing to such conditions. It would be interesting to note what the rights of the sender would be if he refused to use the blank prepared for the purpose and insisted upon tendering a message for transmission without acquiescing in any conditions or limitations whatever. But a consideration of that question would be aside from the present inquiry as to the general tenor of the views of the courts relating to the validity of conditions of this character.

The English courts readily accepted the analogy of the telegraph company to the common carrier of goods, although in the telegraph business no liability is assumed beyond that of reasonable care, and held that by notice the company could relieve itself from any liability whatever unless an extra charge was paid for the repeating of the message, this requirement being deemed a reasonable regulation where the negligence complained of was not gross or wilful;²⁸ and although this case was apparently predicated on a statute regulating the business which by its terms authorized reasonable regulations, nevertheless the American courts first considering the question of limitation of liability in such cases assumed this proposition to be sound as a matter of common law, repeating the exception as to fraud or gross negligence on the part of the company or its servants.²⁹ But the right thus to contract against

²⁸ *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3 (1855).

²⁹ *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226 (1866); *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313 (1908); *Breese v. United States Tel. Co.*, 48

liability for negligence was first fundamentally contested in two cases in which the contractual limitation was predicated on a distinction between ordinary day messages sent subject to the established rate and night messages sent at one-half the regular rate, with the stipulation that no liability whatever was assumed in accepting the night message for transmission; and it was held in opinions traversing the whole field of attempted limitation that even under these conditions any contractual limitation involving release from liability for negligence was void as against public policy.³⁰ In the many states in which the question first was presented for decision after the issue was thus distinctly formed the weight of authority seems to be that any limitation of liability is void.³¹ Other courts have contented themselves with holding that the requirement as to repetition does not relieve the company from liability for negligent mistakes such as would not have been avoided by repetition.³²

In nearly all the telegraph cases in which contractual limitation of liability is held to be invalid the public-service character of the business is emphasized and the conclusion predicated on that ground, although in some of them it is said that conditions embodied in the blank which limit the company's liability may be valid, but not to the extent of relieving it from liability for negligence.³³ But what sort of a stipulation against liability would

N. Y. 132 (1871); *Western Union Tel. Co. v. Carew*, 15 Mich. 525 (1867). This view was adopted by the Supreme Court of the United States. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1 (1894).

³⁰ *True v. International Tel. Co.*, 60 Me. 9 (1872); *Candee v. Western Union Tel. Co.*, 34 Wis. 471 (1874). In the Maine case there was a vigorous and able dissent by Chief Justice Appleton, but the opinion of the majority of the court in that case has been since adhered to. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209 (1873); *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495 (1887).

³¹ *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 17 Atl. 736 (1889); *Telegraph Co. v. Griswold*, 37 Oh. St. 301 (1881); *Brown v. Postal Tel. Co.*, 111 N. C. 187, 16 S. E. 179 (1892); *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783 (1889); *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904 (1896); *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649 (1890). In the Missouri case the Supreme Court overrules its prior decision to the contrary in *Wann v. Western Union Tel. Co.*, 37 Mo. 472 (1866).

³² *Brooks v. Western Union Tel. Co.*, 26 Utah 147, 72 Pac. 499 (1903); *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 50 Pac. 438 (1897).

³³ See, for example, *Sweatland v. Illinois & Miss. Tel. Co.*, 27 Ia. 433 (1869); *Manville v. Western Union Tel. Co.*, 37 Ia. 214 (1873); *True v. International Tel. Co.*, 60 Me. 9 (1872).

be valid is not made clear; it is plain that a stipulation relieving the company from liability for misfortunes occurring without negligence in the use of the uncertain and still slightly understood forces of electricity would not be chargeable to the company even in the absence of such a condition.

Quite pertinent to the present inquiry are suggestions of views in some of these telegraph cases to the effect that regardless of any question of public service an attempt to limit liability for negligence by antecedent contract must necessarily be nugatory.³⁴ But it cannot be said that this broad reasoning is endorsed by any considerable number of these cases.

The telegraph cases also throw some light, or perhaps it may better be said some additional obscurity, upon the distinction between negligence, which according to some of the cases may be contracted against, and the fraud, wilful misconduct, or gross negligence against which no antecedent agreement will be valid. In the Ohio case³⁵ it is suggested that gross negligence is perhaps equivalent to fraud or intentional wrong, and in the Vermont case³⁶ any attempted distinction between negligence and gross negligence is deprecated. In the English case³⁷ a mistake in transmission of a message to the master of a ship which sent him to a different place than the one designated in the message as written was thought not to constitute gross negligence, while in a Kansas case, apparently recognizing the validity of a contract relieving from liability for ordinary negligence, it was thought that three different and distinct mistakes in the message as transmitted were sufficient to show gross negligence against which no limitation would be available.³⁸

In view of the enormous damage which may result to the sender from an apparently insignificant variation in the language of a message as transmitted, which could not reasonably have been foreseen, even where the communication relates plainly to some matter of business, and the inadequacy of the ordinary rate of

³⁴ *Brown v. Postal Tel. Co.*, 111 N. C. 187, 16 S. E. 179 (1892); *Candee v. Western Union Tel. Co.*, 34 Wis. 471 (1874).

³⁵ *Telegraph Co. v. Griswold*, 37 Oh. St. 301 (1881).

³⁶ *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 17 Atl. 736 (1889).

³⁷ *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3 (1855).

³⁸ *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309 (1888).

compensation in cases involving so large a responsibility, it would seem reasonable that in analogy with the agreed valuation permitted by many courts as a basis for differentiation in rates and in liability, some form of limitation of risk where no extraordinary liability was made known and corresponding compensation paid ought to be sustained. But the attempt to limit liability to the price paid for transmission of a message in case an additional charge is not paid for repetition is so plainly an effort to avoid any substantial responsibility for negligence that it has been with practical unanimity disregarded and no other method of apportioning compensation to risk seems to have been devised.

In conclusion, it may fairly be said that there is no general concurrence of views on the part of the courts in a broad proposition that aside from public-service undertakings an antecedent contractual release from liability for negligence which has no characteristic of wilful or intentional wrong is void; while the public-service cases only indicate a general concurrence of view to the effect that obligations to those who are entitled to such service cannot be reduced by any such stipulation.

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JUDICIAL REVIEW OF LEGISLATION IN CANADA

I. INTRODUCTION

NOT many years ago it was asserted that constitutional writers in the United States, although prone to compare American institutions with those of other nations, were "strangely unconscious" of the fact that on the border of their own country there was another great federation, similar in many respects to their own.¹ Within recent years many causes have combined to aid in the discovery of Canada and Canadian institutions, but it nevertheless remains true that most citizens of the United States are still entirely unfamiliar with the political affairs of our nearest neighbor. The same situation prevails with regard to the other self-governing dominions, — all of which have governments exhibiting remarkable comparisons and contrasts with the American political system.

There is always danger of misrepresentation and error in any effort to comment upon a government without a first-hand knowledge of the operation of political affairs. An appreciation of the customs, conventions, and those rather indefinite and vague understandings which play such an important part in the management of governments is indispensable to a thorough comprehension of any political organization. Because of this difficulty much of so-called comparative government degenerates into a formal constitutionalism or legalism which comes far from representing the real truth relative to foreign governments. At the risk of some such errors and misrepresentations this article aims to examine the practice of judicial review of legislation in Canada and to note comparisons between the application of judicial control there and in the United States.² Constitutional jurisprudence borders upon the domains of history, politics, and economics and is concerned with social and political theories as well as with maxims of the law. It is a subject of equal interest to students of government and to lawyers and judges.

Divergent Points of View Relative to Judicial Review in Canada.
In any comparison of the constitutional basis of the federal systems

¹ LEFROY, LEGISLATIVE POWER IN CANADA, Introduction, xliii.

² For a survey of the history of judicial review in the United States, consult volume by the writer on the AMERICAN DOCTRINE OF JUDICIAL SUPREMACY.

of Canada and the United States a notable divergence of opinion among commentators is at once apparent. No less an authority than Professor Dicey avers that so far as its federal characteristics are concerned the Constitution of the Dominion must be regarded as a copy of the Constitution of the United States.³ A Canadian publicist is likewise responsible for the statement that the constitutional relation established between the judiciary and the other branches in the United States has its counterpart in the Dominion, where the judiciary exercise an analogous power in their interpretation of the British North America Act.⁴ Thus it is maintained that the extraordinary function allotted to the judiciary in the United States, — the function of defining and declaring the fundamental law, — is practically duplicated in the Canadian government. Frequent comments by members of the bar in the United States as well as newspaper reports call attention to the fact that judicial control in this country corresponds in all essential principles to a similar authority wielded by the courts of the Dominion.

On the other hand Lefroy, a distinguished authority on Canadian public law, denies that the Canadian Constitution can in any sense be considered a copy of the Constitution of the United States.⁵ This author in his volume on the "Law of Legislative Power in Canada" gives special emphasis to the contention that judicial control over legislation, — the peculiar feature of the American federation, — can in no specific sense be held to be applicable to the Canadian government. Accordingly it is asserted that the framers of the British North America Act adhered as closely as possible to the British system in preference to that of the United States. The sanction of Supreme Court justices and of the Judicial Committee of the Privy Council has been placed upon this opinion.

³ DICEY, *LAW OF THE CONSTITUTION*, 156. See LEFROY, *LEGISLATIVE POWER IN CANADA*, Introduction, for a criticism of this statement and a defense of the view that the Constitution of Canada is similar in principle to that of the United Kingdom. In a note to the third edition of the *LAW OF THE CONSTITUTION*, Dicey styles this claim on the part of the Canadians as "official mendacity," — a term which on account of the vigorous resentment encountered in the Dominion is changed in subsequent editions to a "diplomatic inaccuracy." Cf. DICEY, *LAW OF THE CONSTITUTION*, 3 ed., 155, and 6 ed., 161.

⁴ LEACOCK, *ELEMENTS OF POLITICAL SCIENCE*, 214.

⁵ LEFROY, *LEGISLATIVE POWER IN CANADA*, xliv.

So strong is the conviction relative thereto that in a more recent volume the same author concludes a section discussing comparisons and contrasts between the federal systems of Canada and the United States with this comment: "Little was to be gained except by way of warning from the Constitution of the United States."⁶

The differences between the two systems are dwelt upon at length in the opinions rendered by Canadian Supreme Court justices. Some typical extracts are worthy of quotation in full. "Several decisions of the courts of the United States have been cited to us," observes Justice Gwynne, "but these being based upon the constitution of the several states of the Union and the Federal Government, and upon the constitutional relation which they bear to each other, can afford little assistance upon matters arising under our constitution, which though of a federal nature, is totally different from that of the United States."⁷ Similarly Justice Taschereau maintains:

"The relative positions of the Parliament of the Dominion of Canada, and the legislatures of the various provinces, are so entirely different from those of Congress and the legislatures of the several states, that all decisions from the United States Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution."⁸

The mature conclusion of a member of the Privy Council relative to the matter is summed up as follows:

"I have read a little American Law and constitutional law, and I can only say this: My impression arising from the study of it has always been that there is very little similarity, still less identity, between the American Constitution, — and the Act of 1867."⁹

⁶ LEFROY, CANADA'S FEDERAL SYSTEM, 742.

⁷ *In re Niagara Election Case*, 29 Com. Pl. 261, 274 (1878).

⁸ *The Citizens' and the Queen's Ins. Co. v. Parsons*, 4 Sup. Ct. Rep. 215, 299 (1880).

⁹ Quoted from Lord Watson in LEFROY, CANADA'S FEDERAL SYSTEM, 745; cf. Valin *v. Langlois*, 3 Sup. Ct. Rep., 1, 55 (1879), wherein it is held that, "If there be, in many respects, an analogy between the two countries, there is certainly none whatever in the mode adopted for the distribution of the legislative power;" and *In Re Niagara Election Case*, Justice Gwynne, after a comparison of the two federations, maintains: "It is obvious that a confederation so constituted bears no resemblance whatever to the confederation of states of the American Union. Decisions therefore of the United States courts upon questions arising out of the relation of the several states of the Union to each other, and to the federal government, can be of little assistance to us upon the question before us." 29 Com. Pl. 261, 275 (1878).

This view also has its exponents in the United States. In a recent article relative to Ontario courts and procedure the writer notes that since Canada has no written constitution her legislatures necessarily are supreme and that "Canadian courts like those of England, have no power to declare statutes unconstitutional."¹⁰ Evidently there is a marked lack of agreement as to the relation of courts to legislation under the Canadian Constitution. The relative merit of these points of view can best be judged in the light of a survey of the practice of Canadian courts in reviewing legislation.

Salient Features of Canadian Federal System. Before proceeding to a discussion of the practice of judicial review in Canada it is necessary to point out some cardinal points of difference between the Canadian and American systems. Those features in which the framers of the Canadian federation have followed a different plan of procedure from the United States will be noted here, leaving for later discussion the effect of these features upon judicial review. First among these is the proposition that all legislative powers are distributed between the federal parliament on the one hand and the provincial legislatures on the other. The British North America Act does not contain a series of limitations on legislative power such as is ordinarily comprised within the Bills of Rights of American constitutions. There is no realm of protection to the individual or to property interests which constitute the scope of civil liberty in America. This characteristic is referred to as the omnipotence of Canadian legislatures within their respective spheres.¹¹

A second feature which distinguishes the Constitution of the Dominion from that of the United States is the possession by the federal government of the veto power over provincial legislation. By virtue of sections 56 and 90 of the Canadian Constitution a copy of every provincial act must be sent to the Governor-General, who may within two years after the receipt thereof disallow the Act. This device was intended as a check for the abuse of provincial authority and was regarded as a method of protecting the individual against unjust interference with vested rights.

Third among the salient features of the Canadian federal system

¹⁰ Herbert Harley, 12 MICH. L. REV., 343.

¹¹ Cf. LEFROY, CANADA'S FEDERAL SYSTEM, 30-39.

is the provision that powers not specifically granted to the provinces are reserved to the Dominion. The provinces have no law-making powers except those expressly given them by the British North America Act. In Canada, therefore, the Dominion government not only has power to veto directly the legislative acts of the provinces but the federal government is also the residuary legatee of all powers not specifically granted to the provinces. On this matter a principle was adopted just the reverse of that incorporated in the fundamental law of the United States, wherein it was enacted that all powers not granted to the federal government were reserved to the states. Canada has thus avoided the necessity of expanding her federal authority by means of an implied power doctrine and the practice of progressive adaptation by the judiciary of general provisions which must be modified to meet new conditions. The courts of Canada have been saved from a heavy burden placed upon that department in the United States.

The residuary power whereby the federal government is authorized to make laws for the peace, order, and good government of Canada constitutes the fourth leading principle of the Dominion Constitution. By means of this principle, it was intended to remedy what was deemed "the capital defect of the American Constitution where the preservation of law and order is not summarily and directly the affair of the government of the United States."¹² The responsibility of maintaining public order throughout the entire country is thus placed directly upon the central government.

The combined effect of these principles, — no bill of rights with sphere reserved from governmental regulation; federal veto over provincial acts; provision that powers not specifically granted to the provinces are reserved to the Dominion; residuary authority in the federal government to make laws for the peace, order, and good government of Canada, — renders judicial control over legislation in Canada a different sort of control from that exercised in the United States. This difference is best appreciated by a review of acts invalidated in the courts of Canada and by a consideration of the limitations placed upon the judiciary in the exercise of this authority.

¹² *Ibid.* 94.

II. JUDICIAL REVIEW IN PRACTICE

A survey of the scope of judicial review of legislation in Canada requires a consideration of decisions of the Provincial and Dominion courts as well as the judgments of the Judicial Committee of the Privy Council. In the courts of any one of three jurisdictions, Provincial, Dominion, and Imperial, acts of Canadian legislatures may be impeached and may be declared *ultra vires* or unconstitutional.¹³ Just as in the United States, courts refuse to enforce legislative acts, thereby rendering them null and void. This authority is not infrequently employed by provincial tribunals.

1. *Control by Provincial Courts.* The courts of the provinces, just as those of the states, not only decide as to the competence of provincial legislatures to enact certain measures but also place their stamp of disapproval on Dominion acts which are regarded as beyond federal jurisdiction. This power is exercised with a greater degree of caution than in the United States, but the question of competence is raised not infrequently and the legislative department must justify to the courts its course of action as being within the scope of legislative power.

Among the provincial acts held *ultra vires* by the lower courts are several which interfere with commerce and with specific Dominion powers, such as those relating to the authorization of an issue of debentures to a railway company,¹⁴ the erection of piers and booms in a tidal river,¹⁵ an attempt to grant an exclusive power to an elec-

¹³ There is a disposition on the part of some Canadian publicists to insist that the Canadian notion of an act held *ultra vires* is fundamentally different from the notion of an act held unconstitutional in the United States. For example, "It has been said by an American writer that in Canada the word 'unconstitutional' has a meaning corresponding to its use in the United States. This is an error. We use the word in the same sense and with the same connotation as in the Old Land. Careful speakers and writers use the phrase '*ultra vires*' for 'unconstitutional' in its American meaning; '*intra vires*' for 'constitutional.'" Justice Riddell, 32 CAN. L. T. 353.

If there is any real difference it is not apparent in the decisions of Canadian courts or in the results that follow from such decisions. To one living under another dispensation, it seems that the use of the same term for an act beyond the powers granted to corporations, public and private, and a legislative act passed without authority, is confusing and is not as conducive to clear thinking on the subject as when two definite and specific terms, — "*ultra vires*" for acts of corporations and "unconstitutional" for legislative acts, — are in regular use by bench and bar.

¹⁴ *Queen v. Dow*, 14 New Bruns. Rep. 300 (1873).

¹⁵ *Quiddy River Boom Co. v. Davidson*, 25 New Bruns. Rep. 580 (1886).

tric lighting company,¹⁶ and the Manitoba Shops Regulation Act.¹⁷ Inasmuch as the regulation of insolvency is, by the British North America Act, granted to the Dominion Parliament, certain sections of local insolvent acts have been declared void.¹⁸ A provincial act which authorized police magistrates to try and convict persons charged with forgery¹⁹ and a statute imposing stamps upon law proceedings²⁰ were declared *ultra vires* as interfering with the Dominion power over criminal matters. Because of the Dominion and Imperial authority to control foreign affairs a provision which purported to prohibit the admission of Japanese as provincial voters²¹ and an act intended to prohibit the employment of Chinamen in coal mines²² were invalidated.

In accordance with the American theory of the separation of powers and in an opinion approving this theory and citing cases from American courts it was held that the appointment of the days on which the court should sit is a matter of procedure and of purely judicial cognizance, and is not within the power of the local legislature.²³ A subject on which many controversies have arisen and on which there has been much litigation is the matter of liquor legislation. Just as in the United States, it was originally thought that a kind of concurrent jurisdiction might be exercised on this subject. The courts have denied, however, to the local legislature the power to pass a law prohibiting the manufacture or sale of spirituous liquors.²⁴

One of the most prolonged and most interesting controversies is that with reference to the power of the provincial legislature to tax the salaries of Dominion officials. In a very important decision the

¹⁶ *Ottawa Electric Co. v. Hull Electric Co.*, 10 Queb. Sup. Ct. Rep. 34 (1899); *cf.* also 17 Queb. Sup. Ct. Rep. 420 (1908).

¹⁷ *Stark v. Schuster*, 14 Man. Rep. 672 (1904).

¹⁸ *McLeod v. Wright*, 17 New Bruns. Rep. 68 (1877); *In re Assignments and Preferences Act*, 20 Ont. App. Rep. 489 (1893).

¹⁹ *Regina v. Toland*, 22 Ont. Rep. 505 (1892).

²⁰ *Dulmage v. Douglas*, 4 Man. Rep. 495 (1887).

²¹ *Re Provincial Elections Act*, 8 Brit. Col. 76 (1901).

²² *Re Coal Mines Regulation Act*, 10 Brit. Col. 408 (1904).

²³ *The Thrasher Case*, 1 Brit. Col. 153 (1882).

²⁴ *Regina v. Justices of Kings*, 15 New Bruns. Rep. 535 (1875); *cf.* also *In re Local Option Act*, 18 Ont. App. Rep. 572 (1891) and *In re The Liquor Act*, 13 Man. Rep. 239 (1901), wherein local legislatures were prohibited from permitting municipalities to pass by-laws in the nature of prohibition acts.

Supreme Court of Ontario, following the decision of Marshall in the case of *McCulloch v. Maryland*, approved the American doctrine of implied prohibitions and held that the local legislature could not levy such a tax because such taxation might interfere with the powers given to the federal authorities by the British North America Act.²⁵ This decision was followed and approved in the provinces of New Brunswick²⁶ and British Columbia.²⁷ On an appeal to the Privy Council of a similar decision from Australia,²⁸ the Council reversed the Australian Court and announced the decision that the doctrine of implied prohibitions as accepted and followed in the United States could not be held to apply to the public law of the self-governing colonies.²⁹ When the same issue was presented to the Supreme Court of Canada the justices followed the judgment and reasoning of the Privy Council and reversed the Leprohon and other provincial decisions.³⁰ Thus for Canada the doctrine of implied prohibitions has been definitely rejected at least so far as the federal government is concerned.³¹

Dominion acts may likewise be held *ultra vires* by provincial courts. Though seldom called upon to perform this function, there are sufficient instances to show that the lower courts do not decline when occasion arises to assert the right to refuse the enforcement of Dominion acts. In *Queen v. The Mayor of Fredericton*³² and *Regina v. Bittle*,³³ sections of the Canada Temperance Act of 1878 were held invalid. A section of an act providing for the return of certain immigrants to the country whence they came was held void by the Ontario Court of Appeals³⁴ and provisions of an act of the Dominion for the reception in evidence of certified copies of documents and records in the Dominion land office were invalidated by

²⁵ *Leprohon v. Ottawa*, 2 Ont. App. Rep. 522 (1877).

²⁶ *Ex parte Owen*, 20 New Bruns. Rep. 487 (1881) and *Ex parte Burke*, 34 New Bruns. Rep. 200 (1896).

²⁷ *Regina v. Bowell*, 4 Brit. Col. 498 (1896).

²⁸ *Deakin v. Webb*, 1 Com. L. Rep. 585 (1904).

²⁹ *Webb v. Outrim*, [1907] A. C. 81.

³⁰ *Abbott v. City of St. John*, 40 Sup. Ct. Rep. 597 (1908).

³¹ Cf. *Deakin v. Webb*, 1 Com. L. Rep. 585 (1904) and *Commissioners of Taxation v. Baxter*, 4 Com. L. Rep. 1087 (1907) for a discussion of the application of the doctrine of implied prohibitions in Australia. These and other Australian cases will be discussed in a subsequent article on judicial review of legislation in Australia.

³² 19 New Bruns. Rep. 139 (1879).

³³ 21 Ont. Rep. 605 (1892).

³⁴ *Re Gilhula*, 10 Ont. L. Rep. 469 (1905).

the Manitoba Supreme Court.³⁵ Similarly a provincial court denied the authority of the Governor in Council to establish a ferry on the St. John River.³⁶

2. *Control by Dominion Courts; (a) Over Provincial Acts.* The Supreme Court of Canada has defended the right of the federal government in its control over commerce by prohibiting the legislature of a province from granting exclusive rights of fishing as to the open sea within a marine league of the coast.³⁷ On similar grounds the provincial legislature was denied power to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with the operation of railways subject to the jurisdiction of the Parliament of Canada.³⁸ The authority to prohibit the sale of intoxicating liquors is also withheld from the provincial legislatures.³⁹ An attempt on the part of the Ontario legislature to prevent appeal to the Supreme Court of the Dominion in cases where the amount in controversy is under \$1000 was declared *ultra vires*.⁴⁰ At other times the provincial legislatures were not allowed to permit the operation of lotteries⁴¹ or to prohibit the performance of work on Sunday.⁴²

(b) *Over Dominion Acts.* There are but few cases in which Dominion acts are held invalid. Among the statutes nullified by the Supreme Court are certain provisions in so far as they attempt to confer exclusive rights of fishing in provincial waters;⁴³ sections of the insurance act in so far as they purport to affect companies incorporated by one of the provinces and carrying on business exclusively in such province;⁴⁴ and the provisions of the section of an act assuming to authorize references by the Governor-General

³⁵ *McKilligan v. Machar*, 3 Man. Rep. 418 (1886).

³⁶ *Ex parte Dufour*, 32 New Bruns. Rep. 357 (1893).

³⁷ *Attorney-General of Brit. Col. v. Attorney-General of Canada*, 15 Dom. L. Rep. 308 (1913).

³⁸ *In re Legislation Respecting Railways*, 48 Sup. Ct. Rep. 9 (1913).

³⁹ *Severn v. The Queen*, 2 Sup. Ct. Rep. 70 (1877). Cf. also *In re Prohibitory Liquor Laws*, 24 Sup. Ct. Rep. 170 (1894).

⁴⁰ *Clarkson v. Ryan*, 17 Sup. Ct. Rep. 251 (1890).

⁴¹ *L'Assn. St. Jean Baptiste de Montreal v. Brault*, 30 Sup. Ct. Rep. 598 (1900).

⁴² *In re Legislation Respecting Labor on Sunday*, 35 Sup. Ct. Rep. 581 (1905).

⁴³ *In re Provincial Fisheries*, 26 Sup. Ct. Rep. 444 (1895).

⁴⁴ *In re Insurance Act*, 15 Dom. L. Rep. 251 (1913).

in council to the judges of the Supreme Court for their opinions in respect to matters within provincial legislative jurisdiction.⁴⁵

It is not only the power to say what shall not be law but also the authority to declare that legislative acts are within the competence of one or other jurisdiction which gives the courts their power over the legislative department. The many cases in which legislative power of one branch or other is approved are passed over and those are simply recorded in which through the judgment of a court the act or a portion thereof is rendered void and of no effect. Only a few of the acts thus invalidated can be given in the brief compass of a short article. Nor is it possible to follow the separate decisions here cited through their course in the higher courts in which some have been reversed, some modified in their effect and others approved substantially as decided in the lower jurisdiction. No attempt is made herein to present the nature and status of constitutional law in Canada; it is rather the purpose to show by concrete instances wherein the courts change or check the legislative will. The final jurisdiction in which the acts of Canadian legislatures may be invalidated is the Judicial Committee of the Privy Council.⁴⁶

3. *Control by Judgments of the Privy Council.* The Privy Council is the tribunal to which questions of competence may ultimately be appealed. Cases may be carried directly from the province to the Judicial Committee or may be taken in rare cases from the decision of the highest court of Canada to the Privy Council. No matter how cases reach this court it is generally conceded that the authoritative exposition of the British North America Act rests with this Imperial tribunal.

⁴⁵ *In re References*, 43 Sup. Ct. Rep. 536 (1910).

⁴⁶ "A cause appealed to Ottawa cannot be appealed subsequently to London without the consent of the Privy Council, and this consent is given so seldom as to be practically negligible." Harley, 12 MICH. L. REV. 343; cf. "Our Court of Final Appeals," 48 CAN. L. J., in which it is observed: "As a matter of fact our Supreme Court is often skipped in the course of appeal. Decisions such as that rendered by the Judicial Committee of the Privy Council as to the implementing of the bond guarantee provision of the Dominion Government's agreement with the Grand Trunk Pacific Railway Company; such as that given the other day against the municipal corporation of Winnipeg and in favour of the Winnipeg Electric Railway Company; and such as that in favour of the Toronto Railway Company in the matter of rights upon our streets, have a strong influence to make our Legislatures study, as carefully as the British Parliament does so to draft their measures as to put the intention beyond controversy." (Pp. 205, 206.)

By this court the Quebec Act, which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, was held *ultra vires*.⁴⁷ The Ontario Act of 1892, in so far as it aimed to control the manner of fishing, was held *ultra vires* on the ground that fishing regulations and restrictions are within the exclusive competence of the Dominion.⁴⁸ Likewise the British Columbia Coal Mines Regulation Act, which prohibits Chinamen of full age from employment in underground coal workings, was in that respect declared *ultra vires*;⁴⁹ the provision of the British Columbia Cattle Protection Act, requiring that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, was also invalidated;⁵⁰ an act of Ontario to prevent the profanation of the Lord's Day was held void because an infraction of the act was made an offence against the criminal law, which was held to have been reserved for the exclusive authority of the Dominion Parliament; and it was considered *ultra vires* for the legislature of Ontario to tax property not within the Province.⁵¹

Not only does the Committee check the legislative vagaries of the provinces, but it also sits in judgment upon the interpretation placed upon the British North America Act by the Supreme Court of Canada. That the Committee is disposed to exercise a will of its own is shown in the reversal of the highest court of the Dominion relative to the right of the executive to require answers from the justices on questions both of law and fact. Despite provincial and Dominion decisions to the contrary the Council held it not *ultra vires* for the executive government of the Dominion to request answers from the Supreme Court.⁵²

4. *Fundamental Principles Laid Down by Privy Council.* By far the most important function of the Privy Council as a court of final review lies in the formulation of general principles of interpretation for the Canadian government rather than in the reversal

⁴⁷ Attorney-General for Quebec v. Reed, 10 App. Cas. 141 (1884).

⁴⁸ Attorney-General for Dom. of Can. v. Attorney-General for Provinces of O., Q., and N. S., [1898] A. C. 700.

⁴⁹ Union Colliery Co. v. Bryden, [1899] A. C. 580.

⁵⁰ Madden v. Nelson & Fort Sheppard Ry., [1899] A. C. 626.

⁵¹ Woodruff v. Attorney-General for Ontario, [1908] A. C. 508.

⁵² Attorney-General for Ontario v. Attorney-General for Dom. of Can., [1912] A. C. 571; cf. LEFROY, CANADA'S FEDERAL SYSTEM, 672.

of Canadian courts or the annulment of legislative acts. Wielding the final power of review, subject of course to the Imperial Parliament, which practically never reverses its verdicts, the Council has steadily constructed a body of fundamental principles for the interpretation of the Canadian Constitution. First among these principles is the rule that laws relating to the peace, order, and good government of Canada must of necessity place certain restrictions and limitations upon property and civil rights. Even if a wide general power in the legislature might result in an interference with property rights or a denial of personal rights, the Council emphatically refuses to come to the rescue of such rights and privileges. The suggestion, says the court, "that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power . . . is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."⁵³

A second principle enunciated by the Council is the emphatic denial that the provincial and Dominion legislatures are organs of delegated authority, and with this the rule is affirmed that there is no sphere of liberty between the two governments. The court holds that the provincial legislature derives no authority from the government of Canada, and its status is in no way analogous to that of a municipal institution. It possesses powers, not of administration merely but of legislation in the strictest sense of that word, and within the limits assigned by section 92 of the Act of 1867, its powers are exclusive and supreme.⁵⁴ The local legislature, the Parliament of the Dominion, and the Imperial Parliament are, from the general standpoint of legislative capacity, on the same plane. Their Lordships "adhere to the view which has always been taken by the Committee, that the Federation act exhausts the whole range of legislative power and that whatever is not thereby given to the provincial legislatures rests with the Parliament."⁵⁵

The third and undoubtedly the most important principle of the court lies in the invariable practice of rendering short opinions and

⁵³ Attorney-General for Dom. of Can. v. Attorney-General for Provinces of O., Q., and N. S., [1898] A. C. 700, 713.

⁵⁴ Queen v. Burah, 3 App. Cas. 889, 903 (1878).

⁵⁵ Bank of Toronto v. Lambe, 12 App. Cas. 575, 588 (1887).

confining the discussion to the concise and exact point in issue. This practice is in marked contrast with the lengthy and involved opinions of the supreme courts in the United States. In many controversies each justice of an American court feels it incumbent upon him to render a separate opinion, whereas the Judicial Committee gives only the verdict with the opinion reduced to a minimum, and no dissent is allowed. In performing the difficult duty of interpreting the British North America Act, it will be a wise course, says the court, "for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."⁵⁶ On another occasion their Lordships noted that they were impressed with the justice of an observation by Hagarty, C. J., "that in all these questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy."⁵⁷ Their Lordships will not give speculative opinions on hypothetical questions submitted. The questions must arise in concrete cases and involve private rights.⁵⁸ Finally there is a disposition to avoid the determination of questions largely political in nature. The court dismissed one such question with the significant observation: "The needs of one country may differ from those of another, and Canada must judge of Canadian requirements."⁵⁹ Almost invariably the decisions of this tribunal as a final board of review on the controversial points of public law have received the hearty accord and approbation of the Canadian people.⁶⁰ It is fortunate indeed that the ultimate principles of constitutional law have been formulated by such an eminent group of men, who are entirely removed from the turmoil and recriminations of party politics.

⁵⁶ *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96, 109 (1881).

⁵⁷ *Hodge v. The Queen*, 9 App. Cas. 117, 128 (1883).

⁵⁸ *Attorney-General for Ontario v. Hamilton Street Ry.*, [1903] A. C. 524.

⁵⁹ *Attorney-General for Ontario v. Attorney-General for Dom. of Can.*, [1912] A. C. 571, 587.

⁶⁰ "Canada has given many recent evidences that she has no reason to regret the absence of absolute finality in the decisions of her own courts and has many times shewn that together with all other portions of the British Empire, her people look to the advisers of the Sovereign in Council in matters of the highest moment for a breadth of decision not surpassed by that of any other tribunal in the whole world." From speech of Hon. Wallace Nesbit, reported in 45 CAN. L. J. 105.

III. LIMITATIONS ON JUDICIAL REVIEW

A summary of decisions reversing legislative acts indicates in a general way the character of the checks interposed by the judicial department on the legislative organs of the Dominion. These checks are similar in many respects to the corresponding restrictions enforced by the judiciary in the United States. In some noteworthy cases, principles which have become *fundamenta* of American law are cited, approved, and incorporated into Canadian public law. The insistence on all sides that the courts are the ultimate arbiters as to the scope of Dominion and provincial powers has a very familiar connotation to the constitutional lawyer of the United States. On the other hand the student of judicial control in Canada is at once struck by the fact that there are some marked limitations to the exercise of control over legislation by Canadian courts which do not restrict American justices in the exercise of similar authority.

The first among these limitations is the veto power, which the Imperial government may exercise over Dominion acts and which the Dominion government may exercise over provincial acts. While Canada is a self-governing colony and as a consequence is almost entirely free to manage her own affairs, nevertheless the Privy Council has repeatedly held that the paramount authority of the Imperial parliament has been in no wise lessened by the Canadian Constitution and that the Imperial government has regularly claimed the power to disallow any legislation which the self-governing colonies may enact.⁶¹ In like manner the federal constitution gives the Governor-General full authority to disallow acts of the provincial legislatures, such disallowance being permitted only within two years after the passage of the act. The Imperial power of disallowance has been very rarely applied, except in regard to shipping regulations and the control over foreign affairs.⁶² For the Dominion the device of a veto over provincial acts was evidently designed to avoid the bitter conflicts waged in

⁶¹ Cf. LEFROY, CANADA'S FEDERAL SYSTEM, 50-58, for a discussion and citation of cases.

⁶² For a list of subjects on which colonial acts have failed to receive the royal assent, consult 2 KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS, 1020; among the special subjects noted are (a) copyright; (b) divorce and status; (c) immigration of colored races.

the United States over states' rights. The authors of the plan also conceived that this power could be used to prevent any unjust interference with private rights and property interests by means of provincial acts. In recent cases, however, the Dominion government has refused to interfere in favor of the protection of vested interests and the tenet has been announced that "an abuse of power even so as to amount to the practical confiscation of property, or that the exercise of the power has been unwise or indiscreet," is no valid ground for the use of the veto power.⁶³ As a result of these decisions it is confidently asserted that the veto power of the Dominion is slowly taking its place by that of the Crown and will soon disappear as a vital part of the Constitution.⁶⁴ The veto power, however, remains with the general government and may be called into service at any time to check attempts to injure seriously Imperial or Dominion interests. That the power of disallowance in the Dominion may be used effectively is shown in the refusal to sanction the recent attempt of British Columbia to prohibit Asiatic immigration. It may even yet be revived as a method to assure the protection of property interests and vested rights from the reckless onslaught of popular majorities in the provinces. In theory, therefore, the prerogative to disallow Canadian statutes and the corresponding authority to annul provincial statutes are, legally speaking, in full force and effect, and there can be little doubt that as potential rights the knowledge of these checks acts as a rather effective deterrent on extreme forms of legislative action.⁶⁵

A second limitation on judicial control, and one of much greater

⁶³ See 45 CAN. L. J. 297 *et passim*; cf. also refusal to disallow the Ontario Hydro-Electric Power legislation. "The present interpretation of the section confines the power of disallowance to cases where there is a manifest encroachment by a Provincial legislature." 46 CAN. L. J. 357. The modern theory of disallowance was announced by the Governor-General in this case: "It is not intended by the British North America Act," he holds, "that the power of disallowance shall be exercised for the purpose of annulling provincial legislation, even, though your Excellency's Ministers consider the legislation unjust or oppressive, or in conflict with recognized legal principles, so long as such legislation is within the power of the provincial legislature to enact. The legislation in question, even though confiscation of property without compensation, and so an abuse of legislative power does not fall within any of the aforesaid enumeration."

⁶⁴ 48 CAN. L. J. 244.

⁶⁵ For discussion of the disallowance of provincial acts, see 2 KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS, 725.

significance, is the entire absence of restrictions on the power of the legislature relative to private property and civil rights. The familiar Bill of Rights of constitutions in the United States, with the consequent fetters upon legislative authority and judicial procedure, is a noteworthy omission in the Canadian constitutions. An evident desire to tie the hands of legislatures, which is a characteristic conspicuous in the public law of the United States, is practically unknown in the Dominion and the provinces. Canadians take pride in the fact that all power is divided between the two governments and commend the principle that leaves no gap and that shuts off no peculiar field of non-governmental control.

Certain features of American constitutional law, which have made this kind of law so vital and far-reaching in the United States, are not to be found in the constitutional system of Canada. In the latter nothing prevents the statutes of the provinces from impairing the obligation of contracts and from passing enactments depriving persons of life, liberty, or property without due process of law, or the equal protection of the laws. Such phrases as "liberty of contract," the limitation of the right of eminent domain, "unfair, unreasonable, and discriminating acts," which the courts have striven to define and whereby they have invalidated a considerable number of statutes in the United States, are referred to rarely and are of no practical consequence in the Dominion. If provisions relative to the impairment of the obligation of contract and to the denial of due process of law could be eliminated with all decisions arising therefrom, what would be the effect upon American Constitutional Law! It is easy to conclude that the results in our legal system would be very different from what prevails to-day.⁶⁶ These restrictions, along with others which are placed upon our federal government and the additional limitations on our states, combine to restrain the realm of legislative authority in the United States in a manner which was deliberately rejected by the framers of the British North America Act.⁶⁷

⁶⁶ "One maxim only among those embodied in the Constitution of the United States would . . . have been sufficient if adopted in England to have arrested the most vigorous efforts of recent parliamentary legislation." DICEY, *LAW OF THE CONSTITUTION*, 5 ed., 165.

⁶⁷ In the words of Lefroy, "When one considers the strong position in which the judiciary are thus placed in America, reinforced by the constitutional provisions everywhere found, providing that no person shall be deprived of life, liberty or property

Canadians frequently call attention to the fact that there is an entire "absence of any attempt to fetter the freedom of our legislatures by fundamental limitations such as abound in the United States federal and state constitutions."⁶⁸ It is customary to speak of American legislatures as confined in straightjackets.⁶⁹ Referring to this point of difference between the two systems, the *Canada Law Journal*, speaking editorially regarding the New York Bake-shop Case, says:

"If this decision holds, and there is no appeal from it, except to the court itself in some other case, then the will of the people to provide better conditions for this class of work-people is practically frustrated for all time, or until some amendment can be made to the constitution. . . . Such a condition of things, however, could not arise in Canada, because the question for judicial decision would be which of two legislatures has the legislative power in the matter in question, and though the act of the Federal or a local legislature might be held *ultra vires*, that would not mean that there was no legislative control over the subject matter in question, but merely that the wrong legislature had assumed to deal with it, and it would still be competent to the proper legislature to legislate regarding it, without any constitutional amendment."⁷⁰

Although there are a few *dicta* to the contrary, the general rule appears to prevail that courts may not pronounce acts invalid because they affect private rights injuriously.⁷¹ A statement of the principle as generally applied by the courts is given in an opinion of the Minister of Justice relative to the Ontario Water Power Case, in which he asserted:

without due process of law, and the vague generalities on which the American system permits courts to found decisions as to the validity of legislative enactments, such as 'fundamental principles of justice,' 'natural rights,' 'insuperable incidents to Republican government,' 'consistency with regulated liberty,' it is not surprising that Mr. Burgess should call the governmental system of the United States 'the aristocracy of the robe.'" 42 CAN. L. J. 449.

⁶⁸ 49 CAN. L. J. 656.

⁶⁹ 42 *Ibid.* 463.

⁷⁰ 47 *Ibid.* 10-11.

⁷¹ Cf. *L'Union St. Jacques v. Belisle*, 20 L. Can. Jur. 29 (1874); *Grand Junction Ry. Co. v. The Corporation of Peterborough*, 8 Sup. Ct. Rep. 76 (1882); *McGregor v. Esquimalt & N. Ry. Co.*, [1907] A. C. 462; *Florence Mining Co. Case*, 18 Ont. L. Rep. 275 (1908). For a defense of the view that the veto power of the Dominion government should be used for this purpose and for a discussion of precedents, see 45 CAN. L. J. 299 *et passim*.

"A suggestion of the abuse of power, even so as to amount to practical confiscation of property, or that the exercise of power has been unwise or indiscreet, should appeal to your Excellency's Government with no more effect than it does to the ordinary tribunals, and the remedy in such case is, in the words of Lord Herschell, an appeal to those by whom the legislature is elected." ⁷²

The insistence on this rule, it is asserted, demonstrates the marked difference "between the sovereign powers of Canadian legislatures, when legislating on subjects committed to their jurisdiction, and the limited powers of legislatures in the United States."

Laws interfering with the exercise of private rights are not infrequently passed, and in answer to the contention that the court should afford protection to the rights of the individual, the rule which prevails in England is affirmed, with the following comment:

"It is a thing unheard of, under British institutions, for a judicial tribunal to question the validity and binding force of any such law when duly enacted. While the law remains on the statute book the courts are absolutely bound to give effect to it." ⁷³

At another time it is affirmed, "that it does not belong to courts of justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it." ⁷⁴

IV. COMPARISONS BETWEEN JUDICIAL REVIEW IN CANADA AND IN THE UNITED STATES

What then is the position of the courts of Canada in relation to the legislative power? In theory both federal and local acts may be impeached in any judicial tribunal and are subject to construction, as to whether or not they are *ultra vires*.⁷⁵ Some Canadians insist that there is a vast difference between declaring acts *ultra vires*

⁷² 44 CAN. L. J. 557; also 45 CAN. L. J. 297.

⁷³ Regina v. Kerr, 11 New Bruns. Rep. 553, 557 (1838).

⁷⁴ Severn v. The Queen, 2 Sup. Ct. Rep. 70, 103 (1878).

⁷⁵ Cf. 47 CAN. L. J. 10-11. "An interpretation by the Parliament of Canada of the British North America Act is surely not binding on this, or on any court of justice. It is for the judicial power to decide whether the interpretation put on the Constitutional Act by either the Parliament of the Dominion or the legislatures of the Provinces is correct or not." From Taschereau in Valin v. Langlois, 3 Sup. Ct. Rep. 1, 73 (1879). This view is confirmed by the Privy Council in Citizens Ins. Co. v. Parsons, 7 App. Cas. 96, 108 (1881), wherein it is held to be the duty of the courts to define the limits of the respective powers of each legislature.

and declaring them unconstitutional. The difference, if there is any, is not readily discoverable. In fact, the principles upon which judicial power is based, the practice in the application of the power and the great deference to judicial opinion, — all of which have had such a high development in the United States, — are equally characteristic of Canadian constitutional law.

Thus the foundation principle of Canadian public law is similar to that of the United States, viz., that the courts are called upon to determine the competence of legislative bodies, both Dominion and provincial. It devolves upon a court of justice ultimately to determine whether either government has exceeded the limits of its jurisdiction. There is some dispute as to whether the Privy Council, to which body many such disputes ultimately go, is a judicial or a legislative body. Nevertheless the decisions on controversies in the realm of public law are determined in a regular judicial manner, with the full force and effect of decisions by supreme or superior courts and in ordinary practice are not reversible. At any rate when the Dominion Parliament or the provincial assemblies attempt to go beyond their spheres of action the Supreme Court, and ultimately the Privy Council, may be called upon to decide whether such action is *ultra vires* or not.⁷⁶ Just as under the federal system of the United States, the courts are constantly called upon "to define gradually and with greater exactness as time progresses the relative powers given by the Act to the Dominion and provinces respectively. . . ." ⁷⁷

The practice of Canadian courts is thus described by one of the provincial tribunals:

"We have passed from the time when the powers of the local legislature were under an unwritten constitution, and were in all respects supreme unless Imperial enactments were encroached upon. We are now under a written constitution, where alike the Dominion Parliament

⁷⁶ 48 CAN. L. J. 243. "While, as has been pointed out above, a British judge could not listen to an argument that a statute of the Imperial Parliament is invalid because it goes beyond the limits of parliamentary authority, the position of a judge in respect of a Canadian Statute, Dominion or provincial, is quite different. 'In Canada, as in the United States, the courts inevitably become the interpreters of the Constitution.' Dicey, 164. The powers of the legislatures being confined to certain specified subjects, the courts must necessarily determine in each particular case whether the subject of the legislation is within the specified classes." From *Smith v. City of London*, 20 Ont. L. Rep. 133, 138 (1909).

⁷⁷ *Regina v. Wing Chong*, 1 Brit. Col., pt. 2, 156 (1885).

and the Local Legislatures, alike the Executive and Judiciary, are by that written constitution circumscribed, although supreme within the limits so set forth. It, therefore, follows that Parliament and the Local Legislatures must so adjust their enactments as to meet the requirements of the Constitutional Act. From time to time, by reason of the conflict of laws passed by parliament with those passed by the Local Legislatures, constitutional questions, not only novel but embarrassing, will arise, and these can only be decided by the judicial tribunals.⁷⁸

"When the subject matter of legislative acts is brought before the courts they have to pronounce upon the validity of the enactment. And this they have to do as well in regard to Provincial as Federal legislation; and the Courts have to see and ascertain whether or not the acts are within the powers respectively assigned to Parliament or the Local Legislatures."⁷⁹

The frequent expressions that Canadians have reason to feel satisfied that in Canada they have followed British rather than American precedent in forming their constitutional system,⁸⁰ contain an element of truth; nevertheless this *dictum* by no means gives due weight to the influence of the public law and practice of the United States. For, in the words of Professor Dicey, "The essential characteristics of federalism, — the supremacy of the constitution, the distribution of powers, — the authority of the judiciary, — reappear, though no doubt with modifications, in every true federal state. . . . In Canada, as in the United States, the courts inevitably become the interpreters of the constitution."⁸¹ And in the interpretation of the Constitution, Canadian justices could not, if they would, ignore the remarkable system of consti-

⁷⁸ Queen v. Mayor of Fredericton, 19 New Bruns. Rep. 139, 180 (1879).

⁷⁹ LAW OF THE CONSTITUTION, 180. The plan of control over Dominion Acts may be illustrated by the following outline:

A. Legislative control.

1. Provincial Legislature.
2. Gov. Gen. — Power of Disallowance.
3. King in Council.
4. Imperial Parliament.

B. Judicial Control.

1. Courts of Province.
2. Supreme Court of Canada.
3. Privy Council (England).
4. House of Lords (Supreme Court of Appeal).
5. Imperial Parliament.

⁸⁰ Cf. 47 CAN. L. J. 10, and LEFROY, LEGISLATIVE POWER IN CANADA, Introduction.

⁸¹ 1 LAW QUART. REV. 93.

tutional law and interpretation which has grown up in the United States.

There are many evidences indeed that Canadian judges and jurists have been willing to learn from the United States and to follow the precedents established by our courts although they have not hesitated to criticise and reject such conclusions or principles as have appeared inapplicable to their federal institutions. The debt which Canada owes to the United States is eloquently expressed in some notable opinions of provincial and Dominion justices. In the words of Justice Spragge:

"It is to the Marshalls and Storys of the neighboring Republic, and to their successors in that Court, which is still true to the traditions of the best age of American jurisprudence, that we have to look for guidance and assistance on a subject most familiar to them, — most unfamiliar to us." ⁸²

Similarly, referring to the principles announced by the Supreme Court of the United States, Justice Duff maintains:

"They are the result of a careful application of established canons of construction to a Federal Constitution, in many particulars not unlike our own, by men, some of whose names as constitutional lawyers are unsurpassed in the annals of modern jurisprudence. And they embody a system of constitutional law upon that subject, such as cannot be found elsewhere." ⁸³

On another occasion the court observed:

"In cases like this, where we have no, or scarcely any, English decisions to guide us, for such federations do not exist there, the authorities of the United States, where very similar political bodies exist, though not binding on us, are entitled to the greatest attention and respect, as the production of some of the greatest jurists the world has seen." ⁸⁴

That the Privy Council has not been disposed to encourage this tendency to follow American citations is clearly shown in the important opinion rendered in *Bank of Toronto v. Lambe*. Says the court:

"Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act

⁸² *Leprohon v. Ottawa*, 2 Ont. App. Rep. 522, 533 (1878); also *Ex parte Owen*, 20 New Bruns. Rep. 487 (1881).

⁸³ *Ex parte Owen*, 20 New Bruns. Rep. 487, 497 (1881).

⁸⁴ *The Thrasher Case*, 1 Brit. Col. 153, 216 (1882).

the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. . . . It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole, acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law." ⁸⁵

And the Supreme Court of Canada has also evinced a clear intention not to permit the decisions of American courts to have too great weight in the Dominion. This intention is shown in the reversal of the provincial decisions establishing the rule of implied prohibitions for the purposes of taxation,⁸⁶ and also in the evident desire in recent years to avoid citations to court decisions in the United States. It is no doubt the desire of justices both Imperial and Dominion to build up a constitutional system based on principles which are more closely modelled after modern English law than that of the United States.

Moreover, judicial review in practice is a very different thing in Canada from what it is in the United States. There is no encouragement or incentive to place confines on the legislative realm, for Canadians have not accepted the *dictum* which has had such a vogue in the United States, that it is the chief object of a constitution to confine and restrain the legislative power.⁸⁷ The courts in Canada are disposed to grant a free rein to legislative vagaries as long as each branch keeps within the limits carefully defined by the Constitution. Justices as well as political leaders have been prone to uphold the theory that each legislature is supreme within its special domain. So far as it is possible to judge by the number and importance of acts invalidated, judicial control has decreased as the constitutional relations have become more carefully defined. This decline in constitutional cases has been so marked that there

⁸⁵ 12 App. Cas. 575, 587 (1887).

⁸⁶ *Abbott v. City of St. John*, 40 Sup. Ct. Rep. 597 (1908).

⁸⁷ *Cf. Sill v. Corning*, 15 N. Y. 297, 303 (1857).

is only a slight interest in constitutional law among Canadian lawyers and judges.⁸⁸ This decline is in marked contrast with the development which has given the courts more and more power in the United States and has made constitutional law one of the greatest of our branches of jurisprudence.

One fact which has no doubt aided greatly in clarifying and solidifying the relations between the Dominion and the provinces of Canada, and which accounts in large part for the decline in judicial decisions delimiting legislative power, is the regulative function of the Privy Council. This body is entirely removed from the turmoil of Dominion politics and, from a vantage ground of lofty independence and superiority, it has firmly and effectively laid down the principles which have become the chief tenets of Canadian public law. The difficulty of a coördinate branch of government venturing to assert its authority over another department, which has on various occasions caused bitter feeling in the United States, has thus been averted by referring doubtful questions involving points of delicate political adjustment to this separate and independent judicial tribunal. It is a marked tribute to the wisdom and justice of the decisions of the Council that its decrees have been almost invariably accepted and approved by the public opinion of Canada.

Canadian courts apply no broad guarantees of individual rights. They rarely find it necessary to invalidate acts, and there is always a disposition to permit the legislative act to stand if any justification for jurisdiction over the subject matter appears. Moreover the final court of appeal is the Judicial Committee, which in theory at least is a branch of the legislative department of the English government. The verdicts of this court are subject to the general authority of the Imperial Parliament in its legislative capacity. But Parliament very rarely modifies or reverses its verdicts, so that in fact practically all cases of judicial construction of legislative acts are determined by courts in the regular process of judicial decision. The possibility, however, that the decisions of the Judicial Committee may be reversed in Parliament, that this body has a semi-legislative status and the fact that the legislative acts of federal and provincial parliaments are rather infrequently sub-

⁸⁸ "Constitutional questions are, in comparison with their frequency in the United States, rarely raised in ordinary litigation." Quoted 46 CAN. L. J. 358.

ject to invalidation as *ultra vires*, add color to the *dictum* which Canadians are prone to emphasize to the effect that their legislatures are supreme.

The combined effect of all limitations and restrictions placed about the exercise of this authority renders judicial review in Canada a relatively simple matter of construction. And as the Judicial Committee and high court have developed the principles of interpretation for the Canadian Constitution, cases for the reversal of the legislative will have declined both in the federal and state governments. Cases raising vital issues of construction have arisen quite infrequently in recent years, and if one may venture a prophecy seem likely to grow less and less as time goes on. With the specific powers of both governments carefully outlined in the fundamental law, all powers distributed between the two governments, and with no incentive to the judiciary to exercise a censorship over legislative acts on vague general principles which rest for application with the judicial conscience, it cannot be claimed that judicial review in Canada has anything like the potency that it has in the United States.

On the other hand, the disposition to deny the influence of judicial decisions and the customs prevailing in the federal system of the United States is scarcely in accord with the facts, and evinces something of a spirit of prejudice which may be natural on the part of the public men in a nation with whom our relations in the past have been none too friendly. Indeed the statesmen who framed the British North America Act, who sought to avoid the defects which time and events had shown to exist in the Constitution of the United States⁸⁹ and who aimed to preserve their allegiance and loyalty to their motherland, adopted a form of government which has been declared to be "a happy compound of the best features of the British and American constitutions."⁹⁰ Among the features of this compound, in which the influence of the United States is particularly evident, is the practice of judicial review of legislation, — now a well recognized and highly approved feature of the Canadian Federation.

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⁸⁹ See opinion of Sir John Macdonald, quoted in *In re Prohibitory Liquor Laws*, 24 Sup. Ct. Rep. 170, 206 (1894).

⁹⁰ From opinion of George Brown, quoted in *In re Prohibitory Liquor Laws*, 24 Sup. Ct. Rep. 170, 207 (1894).

COMITY IN THE FEDERAL COURTS

COMITY is a term of international law. Its best definition, in the light of the derivation of the word, is "courtesy." Dicey, indeed, looking at what the courts do when they profess to be actuated by comity, rather than at what they say, has defined it as caprice; and it is perhaps true that no more definite principle than caprice can be said, on the whole, to govern the attitude of the courts of one nation towards those of another. What they say, however, as to their attitude, is always couched in terms of the greatest courtesy. Story says that it has been thought by some jurists that the obligation of nations to give effect to foreign laws when not prejudicial to their own interests is not so much a matter of comity or courtesy as of paramount moral duty.¹ But this is a counsel of perfection.

The attitude of the English courts towards the decisions of American courts may be taken as typical of the working of the principle of comity. In a case like *Castro v. Regina*² we see it given considerable effect. There Lord Watson refers to an American case, "not of course as an authority, because I take it that a judgment of a court in New York is not an authority in a case arising in England, with regard to English rules of procedure, but as a decision of learned judges that ought to influence the House to come to the same conclusion in the present case." "Ought to influence" puts it about as strongly as international comity can be put.

The attitude of American courts towards the decisions of English courts is theoretically precisely that expressed by Lord Watson, but practically the psychological standpoint is slightly different. Here there would be the respect for learned judges, of which Lord Watson speaks, with an added element of respect for judges sitting at the very fountainhead of our system of law. It is comity in each case, and comity is only courtesy; but the courtesy of the parent towards the child is not just the same thing, psychologically, as the courtesy of the child towards the parent. That

¹ CONFLICT OF LAWS, § 33.

² 6 App. Cas. 229, 249 (1881).

there are these psychological elements in comity is a consideration not to be overlooked in a study of its workings as a judicial principle.

In American law the word "comity," in addition to its normal use, has been borrowed to express relationships not international. The logical anomalies of a federal union have brought this about. The qualified kind of sovereignty prevailing under a federal government has led to a qualified conception of comity. Our sovereign states, in so far as they are sovereign, possess to that extent sovereign judicial powers. The relation between independent state tribunals, acknowledging no appellate superior within the sphere of their domestic concerns, came naturally enough to be expressed by the word "comity." But it is not quite the comity of international law. It is a comity exercised under the dominance of the "full faith and credit" clause of the Constitution, and under limitations which preclude the final determination of questions of federal constitutional and statute law. The terms in which this kind of comity is expressed in judicial discussion of the subject in our state courts are the same as those used to define comity in international law; but the underlying difference in situation should not be lost sight of.

Furthermore, just as the states have their own field of sovereignty, and their own courts with jurisdiction in that field, so has the federal government a field of sovereignty, and a system of federal courts exercising jurisdiction in that field. These federal courts, aside from the Supreme Court with national jurisdiction, have a local jurisdiction, geographically limited. Each District Court, like the old Circuit Court, now merged in the District Court, has jurisdiction only within its own district, which covers either a whole state or some definite part of a state. Each Circuit Court of Appeals, of which there are nine for the country, has jurisdiction over the groups of states which Congress has assigned as its circuit. Each District Court is independent of every other District Court, each Circuit Court of Appeals of every other Circuit Court of Appeals. Congress has not defined their attitude towards each other. What should that attitude be? It has been left to them to settle it for themselves, and they have said that it should be one of comity. But if comity, it is comity of a new kind,—it is not the comity of international law. It is comity between courts of the same sovereignty, administering the law of that sovereignty. This was not the situation under which the doctrines of comity took shape;

it was not at all a situation for which a principle that Dicey could only define as caprice was adequate. Yet the courts have not always been careful to keep this difference before them, and their use of an international vocabulary in a domestic situation has kept the subject under the influence of international conceptions.

In the United States Supreme Court itself, where is lodged the final check upon divergence of view in the federal courts, the distinction has not been kept clear, for in *Mast, Foos, & Co. v. Stover Mfg. Co.*³ we find Mr. Justice Brown using the following language, *à propos* of a contention that comity should have induced the court below to follow a decision in another circuit:

"Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other coördinate tribunals."

These words are classic in their clarity, and wholly admirable as a definition of comity in the international sense; but it may be permitted to doubt whether they outline a wise policy for the guidance of the inferior federal courts in their mutual relations. Moreover, they are perhaps reduced to the category of a *dictum* when the learned justice adds (p. 489):

"It is scarcely necessary to say, however, that when the case reaches this court, we should not reverse the action of the court below if we

³ 177 U. S. 485, 488 (1900).

thought it correct upon the merits, though we were of opinion it had not given sufficient weight to the doctrine of comity."

It is to be noted, too, that the cases which Mr. Justice Brown cites in his opinion are all cases which hold for uniformity of decision by different courts in patent litigation. Indeed, in patent causes the necessity for uniformity of decision has been well-nigh universally recognized.

Back in 1874 Judge Emmons, sitting in the Eastern District of Michigan, gave elaborate consideration to this question of consistency in the interpretation of patents, in the fierce litigation over the patent for a rubber plate for false teeth. Speaking of the principle that courts of the same government, having the same jurisdiction to decide the same points, should not be at variance with each other, he said in his opinion:

"If one system of coördinate courts more than another calls for the application of this general principle it is that of the Circuit Courts of the United States. They all have similar special jurisdiction, and are all, in an eminent degree, looked to for all those rules of right and property created under the Federal Statutes, and in reference to the subjects coming within the Federal Constitution. Although divided in jurisdiction geographically, they constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the Appellate Court.

"The comment at the bar upon this subject assumed that the final decrees and elaborately-reasoned decisions of circuit judges, with full citations and criticisms of authorities, often involving the entire history of the law upon the subject discussed, are to be ranked with what are termed *nisi prius* decisions. They are in all respects judgments *in banc*. They not only have the deliberation and care of judgments in the high courts of Chancery in England and this country, but the court of itself bears the same relation to the whole judicial system that such courts do to those in which they exist. There is but one Appellate Court above them. A superior tribunal also reviews the judgments of the English Chancery, and so of nearly all the like state tribunals.

"Although we would by no means confine our acquiescence in the decisions of our brother judges to cases where the particular patent has been adjudged to be valid, or that a particular device infringes upon it, still we think that eminently beyond other cases is the rule applicable to them. The right of the complainant is a special franchise granted by

the political power. A special organism is created for the purpose of ascertaining his right to the grant. When issued, the several federal courts are authorized to review the rectitude of this action, and from their determination an appeal lies to the court of last resort. It is an indivisible system for ascertaining the rightfulness and the limits of the patent, and when, in any coördinate department of it, judgment has been pronounced, that duty should be deemed performed until reversed by an appellate tribunal. It would present an unseemly spectacle for the same governmental grant to receive half a dozen different constructions in as many coördinate courts, all authorized to define it and inform the citizens what it means, and all having the force of law contemporaneously under the same government. . . . Until some special tribunal is instituted for the determination of these questions, and some general mode of reviewing these public grants, which shall test definitely the rightfulness of the grants, it will result in a large saving of money to the great masses of our citizens who are using these improvements, to let them and their advisers of the profession understand that a fair and full examination in one court, followed by a judgment, will, in the other coördinate tribunals, be acquiesced in as law, if there is no appeal and reversal." ⁴

Judge Emmons supports his reasoning with citations of instances of conformity among the federal courts, among them one which has the weight of the great name of Mr. Justice Story, where, sitting in the First Circuit, he deferred to a decision of Mr. Justice McLean in the Third Circuit, saying that, "although his mind was not without much difficulty on this point, he should rule for the plaintiffs, in accordance with the opinion of Mr. Justice McLean." ⁵ Judge Emmons's language makes the question of public policy so clear that it hardly needs to be supplemented, yet it may be well to quote from a few of the later cases in which the language is especially persuasive.

In *Shreve v. Cheesman*,⁶ Circuit Judge Sanborn had occasion to consider this question of uniformity of decision. He first quotes Chancellor Kent's statement: ⁷

⁴ *Goodyear Dental Vulcanite Co. v. Willis*, 1 Flipp. 388, 393 *et seq.* (1874). This language was approved by Circuit Judge Wallace in the Second Circuit in *Reed v. Atlantic & P. R. Co.*, 21 Fed. 283 (1884).

⁵ *Washburn v. Gould*, 3 Story 122, 133 (1844). Mr. Justice Miller's conception of comity between judges of different rank exercising the same jurisdiction is expressed in *Appleton v. Smith*, 1 Dillon 202 (1870).

⁶ 69 Fed. 785, 790 (1895).

⁷ 1 KENT, COMM. §§ 475, 476.

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."

He then adds:

"It is a principle of general jurisprudence that courts of concurrent or coördinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court."

In an admiralty case,⁸ in the Eastern District of Pennsylvania, Judge Butler went counter to his own views because of rulings upon the same point in other districts. Citing these rulings he says:

"In neither of the cases is the subject discussed at any length, or any adequate reason assigned, in my judgment, for the conclusion reached. So great, however, is the importance I attach to uniformity of decision by courts of coördinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle."

Nor is it a valid objection that the parties before the court are not the same. Judge Green in the District of New Jersey puts this strongly:⁹

"The fact that the defendant in the present case was not in any wise personally interested in the former case cannot be regarded as lessening in any degree the binding effect of a solemn decision made in that cause. What was decided was a question of law arising upon these very letters patent. Such decision becomes a precedent, to be followed in all cases in which the same legal question, arising from the same letters patent, presents itself for consideration, and an authority implicitly to govern, unless it clearly appears that the principles which underlie it have been grossly misunderstood or misapplied."

⁸ *The Chelmsford*, 34 Fed. 399, 402 (1888).

⁹ *Zinsser v. Krueger*, 45 Fed. 572, 574 (1891).

In *Edison Electric Light Co. v. Packard Electric Co.*¹⁰ Mr. Justice Miller is quoted as follows:

"I think that the uniform course of decisions in the courts of the United States, where a previous decision has been had by a circuit court with regard to the validity of a patent, has been to treat it as of the very highest nature, and as almost conclusive in an application for injunction in another case founded on the same patent."

In a patent suit in the Eastern District of Pennsylvania¹¹ Judge Butler, in following a decision on the same patent in the District of Connecticut, said:

"A proper regard for the interests of suitors requires that the decisions [in Connecticut] shall be given controlling effect. The importance of uniformity in the law, as administered in the several circuits, is too great to be disregarded, even where the judges may differ in opinion. Conflicting decisions on the same patent would be an intolerable evil."

And this was said by Judge Blodgett, in the Northern District of Illinois,¹² to be "the true policy of the United States courts in reference to patent cases."

Likewise Judge Taft, sitting in the Southern District of Ohio,¹³ says:

"It is well settled that a decision of one circuit court, after a full hearing, in a patent case, upon substantially the same evidence, will be followed in another circuit court, and that, if a different conclusion is to be secured, the case must be carried to an appellate court."

Circuit Judge Dallas has put the matter upon higher ground than that of comity:¹⁴

"If the rule here adverted to were one of 'comity' merely, it would, I think, be impossible to justify its derogation from the right of suitors to the veritable judgment of the tribunal to which any particular case is confided for decision. Upon general questions of law, the views of courts of coördinate jurisdiction are always regarded with respectful consideration, but never as controlling. In patent causes, however, conclusive effect is accorded by each of the circuit courts of the United

¹⁰ 61 Fed. 1002 (1893).

¹¹ *Enterprise Mfg. Co. v. Deisler*, 46 Fed. 854, 855 (1891).

¹² *Kidd v. Ransom*, 35 Fed. 588 (1888).

¹³ *Allington & Curtis Mfg. Co. v. Globe Co.*, 89 Fed. 865, 866 (1898).

¹⁴ *Office Specialty Mfg. Co. v. Winternight & Cornyn Mfg. Co.*, 67 Fed. 928 (1895).

States to a prior judgment of any other of them, wherever the patent, the question, and the evidence are the same in both suits, not on the ground of comity alone, but with the practical and salutary object of avoiding repeated litigation and conflicting decrees in the courts of the several districts upon matters which, having been once passed upon by a court of first instance, ought to be referred to a court of appeal for authoritative determination."

It will be seen that patent cases have called out the strongest judicial expressions in favor of uniformity of decision, but in other fields of federal jurisdiction a like policy has been adhered to. A decision in admiralty has already been quoted. In receivership matters involving operations in different states the impropriety of conflicting interpretations of the scope of the receivership has been recognized, and in customs cases uniformity in applying the terms of the Tariff Acts has usually prevailed.

If we could leave the subject of federal comity here, with only the judicial utterances quoted to elucidate the topic, there would be nothing of what Dicey had in mind when he defined comity as caprice; but we must turn to another line of thought upon the subject where caprice is sufficiently manifest. Indeed, Judge Dallas might well claim for uniformity of decision in patent causes a higher sanction than that of comity, for an examination of the whole field of decision reveals comity as rather an uncertain reliance. Comity alone as a controlling principle seems to give too much play to some very human weaknesses, — weaknesses which judges share with the rest of mankind. Too many judges, of strong individuality, are unequal to the self-effacement required to make comity a wholly effective principle of federal jurisprudence. Some of them, if not avowedly, yet in practical effect, seem to approach the decisions of courts of no higher commission than their own from the standpoint of the Irish judge who said that "when a decision of one court is cited to another of coördinate authority, the latter has a right to regard it in a critical or even sceptical spirit."¹⁵ When parties before the court are assiduously

¹⁵ *In re Tottenham's Estate*, Ir. 3 Eq. 528 (1869). There are expressions about comity in English decisions, and in the courts of the Empire outside of England, that show much the same tendencies and impulses that we find in our federal courts. The old courts of Westminster Hall, the Common Pleas, King's Bench, and Exchequer

urging it to exercise its independent judgment, this sceptical spirit is easily yielded to; and though the cases in which it has prevailed over other considerations are neither so numerous nor so persuasive as those in which the advantages of a uniform administration of the law have been kept steadily before the eye of the court, they are sufficient in number to make the question of the mutual relations of the coördinate federal courts one of some uncertainty.

For example, we find Judge Knowles, in the District of Montana,¹⁶ when it was urged upon him that if one circuit court decides a point all the others should conform, saying flatly that "this is not the rule which prevails in the circuit courts of the United States," and he fortifies this with the Bible. "In the Bible," he says, "there is the command: 'Thou shalt not follow a multitude to do evil.'"

Judge Knowles was not sitting in a patent case when he expressed himself in that manner; but even in patent cases, where there is such general agreement the other way, like views have been enunciated. Thus, in the Western District of Missouri,¹⁷ Judge Phillips says of a decision in another district on the patent then before him:

"The only consideration to which that decision is entitled, aside from the recognized ability of the judge, rests upon the comity between courts. The broadest application that can possibly be claimed for this principle is that the decision of courts of coördinate jurisdiction upon the same subject-matter of controversy is entitled to high respect as a precedent, when the subsequent case presents substantially the same state of facts. The former case is not conclusive. After giving due weight to all prior adjudications, the question of infringement of a patent is still to be determined in each particular case as it arises on the evidence adduced."

followed each other's decisions as a matter of comity among judges, but the vice-chancellors have often shown considerable independence of each other. (See *The Vera Cruz*, 9 P. D. 96 (1884); *Gathercole v. Smith*, 44 L. T. 439 (1881).) The Court of Appeal, by Brett, M. R., has said that "a court of law is not justified, according to the comity of our courts, in overruling the decision of another court of coördinate jurisdiction." *Palmer v. Johnson*, 13 Q. B. D. 351, 355 (1884). In a more recent case, Sir Swinfen Eady, sitting as a judge of first instance in England, held that he was bound by the unanimous judgment of the Court of Session in Scotland construing an Act of Parliament which applied to both England and Scotland. *In re Hartland*, [1911] 1 Ch. 459, 466.

¹⁶ *Northern Pac. R. Co. v. Sanders*, 47 Fed. 604, 613 (1891).

¹⁷ *Worswick Mfg. Co. v. City of Kansas*, 38 Fed. 239, 241 (1889).

Likewise Judge Archbald, in the District of New Jersey,¹⁸ made an elaborate examination of the question of the validity of a patent which had been the subject of extended litigation in the Second Circuit. He acknowledged the decisions in that litigation as of material assistance to him, but held that he was not controlled by them, nor absolved from an independent examination of the questions involved, and claimed for his conclusions, though indeed conforming to those decisions, that they were substantially his own.

And Judge Kohlsaat, in the Northern District of Illinois,¹⁹ after stating that there was no material difference between the papers before him and those before the courts in litigation over the same patent in the Second Circuit, said:

"Complainant seeks to have this court follow the decisions of the courts of the Second Circuit upon the questions of validity and infringement, in accordance with a rule of comity which is said to prevail in some circuits; but the utterances of the Court of Appeals of this circuit have been positive to the effect that each case in this circuit must be decided upon its merits as disclosed by the record therein, and that a ruling or opinion of any other Circuit Court or Court of Appeals upon any question involved should be given only its just and reasonable weight according to the circumstances; and it therefore follows that this court should give weight to the said decisions in the Second Circuit only to the extent that the reasoning therein, as applied to the facts presented by this record, may be persuasive."

The learned judge does not cite the positive utterances of the Court of Appeals for his circuit (the seventh) which guided him in this decision. But it remains for us to consider the attitude of the several Circuit Courts of Appeals towards this matter of comity.

The Circuit Court of Appeals Act of 1891 made an important modification of the federal judicial system. It introduced a new tribunal into each of the nine circuits into which the judicial districts of the country were already grouped,—an appellate tribunal to take over a substantial portion of the jurisdiction of the United States Supreme Court. Much of the jurisdiction of this new court, including patent litigation, was made final, though to the Supreme Court was left a power of intervention by certiorari. It should be

¹⁸ *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 120 Fed. 672, 674 (1903).

¹⁹ *Welsbach Light Co. v. Cosmopolitan, etc. Co.*, 100 Fed. 648, 649 (1900).

remembered, however, that certiorari from the Supreme Court is always a matter of grace and not of right, and that it is a remedy very sparingly granted.

The entry of nine Circuit Courts of Appeals into the field of federal judicial action has made the question of comity among the federal courts one of increased seriousness. It has, to be sure, reduced the opportunities for confusion by bringing some eighty odd districts, each clothed with powers of independent action, into nine family groups under a local appellate tribunal; and the effect of this is inevitably to produce a degree of cohesion within each group that practically prevents discordant rulings. But, on the other hand, a lack of uniformity of action among nine appellate courts, vested with a large measure of finality of decision, is a more serious matter than diversity among courts of first instance. With the country, as it were, divided for federal judicial purposes into nine independent principalities, the views of the nine appellate courts of their proper attitude towards each other, — in other words, their views of comity, — take on increased importance.

When we investigate those views we find the same tendencies at work that had been apparent in the lower courts. Some of the Courts of Appeals have seen themselves clearly as parts of a whole, and have recognized the necessity of subordination to the integrity of the system of which they were a part, while others have regarded themselves as clothed with an independent jurisdiction which it would be stultifying to minimize in any degree. The best expression of the first point of view is found in the opinion of Judge Putnam in *Beach v. Hobbs*.²⁰ This opinion was delivered, indeed, in the Circuit Court, but the Court of Appeals adopted his views when the same case came before it on appeal.²¹ Judge Putnam handled the subject with a firm grasp, and he must be quoted at some length:

“It is necessary, first of all, that we should determine the effect to be given to the legal proceedings in the Second Circuit. . . . So far as any proposition may be fully presented to the Court of Appeals in any circuit, and determined by it, resulting in a rule which is, and ought to be, of general application, especially when it involves federal questions, a condition of adjudications which would defeat uniformity throughout the United States would clearly disappoint the contemplation of Congress

²⁰ 82 Fed. 916, 918, 919 (1897).

²¹ *Hobbs v. Beach*, 92 Fed. 146, 147 (1899).

in establishing those tribunals. It certainly was not the expectancy of Congress that the establishment of those courts would destroy the general uniformity of adjudications in the federal tribunals touching general principles of law, and especially touching federal questions, which has heretofore existed; nor was it its purpose to create several centres for the determination of that class of questions, which would take on a local character, as is the fact with reference to the various state tribunals. As was said by the Circuit Court of Appeals for this circuit in *Beal v. City of Somerville*, 1 C. C. A. 598, 50 Fed. 647, 652, the Circuit Courts of Appeals must maintain themselves as tribunals of final jurisdiction, notwithstanding the possibility that cases disposed of by them may in some form reach the Supreme Court. In view of this fact, a decision of the Circuit Court of Appeals in any circuit, so long as it remains unappealed from, and so long as the Supreme Court has not issued its writ of certiorari to reëxamine it, must be regarded as having more effect than that ordinarily given to even the highest state tribunals, or to any court of merely concurrent jurisdiction, no matter how great its learning. There seems to be no method of maintaining the necessary uniformity of the law with reference to general questions, especially federal questions, unless the mature and solemn judgments of a Circuit Court of Appeals in any circuit are accepted as authoritative declarations of the law, subject only to such criticisms on the score of oversight or evident mistake as would apply to a judgment of the Circuit Court of Appeals in the particular circuit where the litigation then under determination may be pending."

The learned judge then adds as to patent litigation:

"These considerations have a special importance as applied to a solemn and well-considered judgment of any Circuit Court of Appeals with reference to a patent for an invention issued by the United States, when the state of the proofs remains substantially the same, in view of the reluctance of the Supreme Court to issue writs of certiorari in causes of this character involving mainly questions of fact; otherwise such patents, although intended by statute to have effect throughout the whole country, would, for practical purposes, be territorially limited, and would be of effect only in portions thereof, and practically invalid in other portions."

The adoption of Judge Putnam's views on this matter by the Circuit Court of Appeals for the First Circuit settled the attitude of that court, an attitude which it has ever since carefully adhered to.

In the Second Circuit the Circuit Court of Appeals has tended towards the position taken in the First Circuit; but it has not committed itself squarely to it. In *Norwich, etc. Society v. Stanton* ²² it followed a decision of the Circuit Court of Appeals in the Ninth Circuit, saying that it was "very far from being clear" that that decision was erroneous. In *Erie R. Co. v. Russell*, ²³ an action involving the federal Safety-Appliance Act, it followed a decision of the Circuit Court of Appeals in the Eighth Circuit "in view of the desirability of uniformity in the decisions of the courts of the different circuits in interpreting this act," and its action is made the more impressive by the intimation in the opinion that a majority of the court would have reached a different conclusion in the absence of that Eighth Circuit authority.

In the Third Circuit the Circuit Court of Appeals has refrained from running counter to decisions in other circuits, but it does not seem to have established for itself any general rule. In some of its cases it has expressed a very strict policy. Thus in *Aspinwall's Estate*, ²⁴ upon a question of its own jurisdiction, the court said:

"This question was before the Circuit Court of Appeals for the First Circuit in *Re Coe*, 1 C. C. A. 326, 49 Fed. 481; and it was there held that the disallowance of an appeal from an order remanding a cause to the state court in which it had originated was proper. It has been urged in argument that the reasons given for the judgment in that case are unsound; but that contention is, in our view of the matter, irrelevant. We believe it to be our duty to follow that judgment, not for the reasons assigned in its support, which it is not necessary either to adopt or to reject, but because uniformity of decision amongst the several Courts of Appeals upon such a jurisdictional question seems to us to be of paramount importance. It will not result from acceptance of this view of the subject that an error once committed would be indefinitely perpetuated, for the Supreme Court may at any time settle such questions for all the Courts of Appeals alike."

And in *McCoach v. Philadelphia, etc. Co.*, ²⁵ where the court had before it a suit on an internal revenue statute, in which the court below had followed a decision of the Circuit Court of Appeals for the Second Circuit, it said:

²² 191 Fed. 813 (1911).

²³ 183 Fed. 722, 725 (1910).

²⁴ 90 Fed. 675, 676 (1898).

²⁵ 142 Fed. 120, 121 (1905).

"We think, not only that the court below was clearly right in following the decision of the Court of Appeals for the Second Circuit, but that this court, also, should follow it. We base this ruling, not upon comity merely, but upon the ground that in suits of this character uniformity in the judgments of the several Courts of Appeals is especially important, and should be maintained wherever, as in the present instance, there has been no decision of the Supreme Court which precludes it."

In *Hill v. Franchlyn & Ferguson*²⁶ the same court, in a suit relating to duties under the tariff act, even followed the decision, not appealed from, of a court of first instance in the Second Circuit, saying:

"In suits of this character, uniformity in the judgments of the courts of first instance, as well as in those of the appellate tribunals, is desirable, and where no direct attack has been made upon a prior adjudication by a Circuit Court of the question sought to be subsequently raised in a similar suit we think that the prior adjudication, unless clearly erroneous, should be followed."

But in a later case, *F. B. Vandergrift & Co. v. United States*,²⁷ the court again had before it a question under the Tariff Act which had been decided below on the strength of a Circuit Court decision in the Second Circuit, and here its language seems to throw comity back into uncertainty, although it is not of comity between Circuit Courts of Appeals that the opinion speaks:

"Did the learned judge err in adopting the decision of the Circuit Court for the Southern District of New York? . . . The learned judge was clearly right in saying that it is desirable that different decisions should not be made as to the rate of duty upon the same articles in the different districts. There rests undoubtedly upon a court the duty of determining by its own investigation whether or not the article should bear a certain duty. This is saying no more than that each court will decide the question for itself, unless the appellate court has determined the question for it; but that it has been decided in a certain way in one jurisdiction should have weight, because of the desirability of having uniformity of decision upon the same question, and the decision itself has a certain persuasive value, determined by the strength and logic of its statement, and this is especially true of the case at bar. While, therefore, we would not feel ourselves bound by a decision of a court of another jurisdiction upon the same question, we are satisfied in this case

²⁶ 162 Fed. 880, 881 (1908).

²⁷ 173 Fed. 609, 611 (1909).

that the learned judge made no error in following the decision in the Eckstein case."

Of the remaining circuits, only in the Seventh has there been any reference by a Circuit Court of Appeals to this topic, and the reference there is of the briefest character. In *Heckendorn v. United States*²⁸ that court said:

"The questions propounded by appellant have been decided adversely to his contentions by the Circuit Court for the Northern District of New York and by the Court of Appeals for the Second Circuit. . . . But appellant is right in claiming that he is entitled to our independent consideration and judgment."

This declaration of independence gains emphasis from the circumstance of its utterance in a case under the Tariff Act, where the confusion which would be produced in the collection of customs duties by diversity of rulings in different parts of the country is so obvious; but in practical result it did not make for immediate confusion, since the court's independent consideration of the question led it to the same result as that reached in the Second Circuit.

Indeed, it is to be noted that, although there has been this diversity in some of the utterances of the Circuit Courts of Appeals, there has been no diversity of action. The independent and uncontrolled judgment which in a few instances has been asserted has led to no conflict of decision. On the whole, probably none is to be apprehended. The system of federal Courts of Appeals is still young. It may be trusted, as time goes on, to work out a policy of harmonious action among the coördinate jurisdictions. The judges of a system of national courts must increasingly feel the constraint, not of an international comity of caprice, which is no constraint at all, but of a national comity of order and consistency, dictated by sound principles of public policy. In yielding to such constraint the courts are not belittling themselves; rather do they gain in dignity thereby. The national courts, administering the national law, constitute a system which must be at unity with itself.

Arthur March Brown.

BOSTON, MASS.

²⁸ 162 Fed. 141, 142 (1908).

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JOHN CHIPMAN GRAY, Royall Professor Emeritus at the Harvard Law School, died at his home in Boston on Thursday, February 25, 1915, in his seventy-sixth year. An appreciation of Professor Gray and his services to the Law School and the law during the forty-four years of his professorship appears elsewhere in this issue. As Professor Gray had retired from active lecturing in the School two years before his death, none of the present students has had the immediate benefit of his instruction. They, however, have profited, as will many classes to come, from the use of his masterful case books and treatises and from feeling his influence through others who have succeeded him. Although Professor Gray was a familiar figure in the library as he was preparing the latest revision of the volume which was published just before his death, the students of to-day were deprived of the pleasures of closer association with him in the classroom, an association, which it is traditional in the School, led always to the truest affection for their instructor. To those who have entered the School since his retirement there has ever been the feeling of deep regret that they barely missed the boon of listening to one of the great masters of the common law. Harvard Law School indeed feels the loss of the last of her four great leaders, — Langdell, Ames, Thayer, and Gray, — who introduced a new era in legal education.

The REVIEW cannot acknowledge too strongly the obligation it owes to Professor Gray. Throughout its existence it has been guided by his counsel and enriched by contributions from his pen.

THE AMES COMPETITION. — The modifications introduced this year in the Ames Competition, by substituting a round-robin tournament between second-year law clubs for the old elimination tournament, have had excellent results in operation. Forty-four cases were argued in the course of the six rounds. This is more than twice the number argued last year, and more than were argued in any two previous years of the Competition, taken together. It is estimated that over one hundred second-year men participated in the arguments, more than half of whom argued two cases. Twenty law clubs entered the first round of the Competition, and fourteen remained through the sixth. No prizes were awarded for work during this preliminary tournament, but pursuant to the rules newly adopted this year, the following clubs, which won five out of the six cases argued, will be admitted to the elimination tournament next year leading directly to the Ames Prizes: Kent, Marshall, Moody, and Westengard.

TRIAL BY NEWSPAPER. — Flagrant newspaper reports and comment upon trials pending in the courts so often go unnoticed and unpunished, that the summary and courageous action of two federal judges recently is indeed refreshing to all desirous of the orderly and fair administration of justice. A federal district judge, sitting in New York City, took from the jury a pending suit for alienation of affections, and sent it to the foot of the calendar for the reason that an interview with the plaintiff had been widely featured in the morning papers. *Kleist v. Breitung*.¹ Only a short time before, a federal district judge in Ohio summarily laid a heavy contempt fine upon a local daily for having urged the violation of an injunction during a street railway agitation and otherwise expressed in partisan language an attitude antagonistic to the court. *United States v. Toledo Newspaper Co.*² Both were conscientious attempts to uphold the dignity of the courts and further justice, yet no doubt both called forth from the aggrieved papers a storm of indignation and a cry that

¹ (Unreported.) Feb. 12, 1915. Learned Hand, J. The interview was given by the plaintiff himself without the knowledge of counsel, and related to facts not in evidence and prejudicial to the defendant. The power of district courts to order a new trial for misconduct of the parties is not defined, but left to rest on common-law principles. U. S. R. S., § 726. There appears to be no precisely analogous case, but there are cases such as *Baker v. State*, 82 Ga. 776, 9 S. E. 743, where a new trial was ordered because plaintiff discussed his case within hearing of the jury during recess.

² Killits, J. (not yet reported). There seems to be considerable doubt whether a federal district court can summarily punish a newspaper for contemporaneous comment under any circumstances. In no other case has it ever been done, and there is an old decision squarely *contra*. *Ex parte Poulson*, 19 Fed. Cas., No. 11,350. The statute says, "The said courts shall have power to punish . . . contempts of their authority; Provided, that such power shall not be construed to extend to any cases except misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." U. S. R. S., § 725. Judge Killits in an elaborate opinion declares that the former decision referred to reflects the influence of a local state statute on the judge who decided it, is inconsistent with the historical setting surrounding the passing of the act as seen in the Congressional debates, and has been virtually repudiated by expressions of opinion in the Supreme Court in later cases.

In Massachusetts, the state courts have no hesitation in punishing newspapers for contempt of court in such cases. See *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449.

the rights of the people must be championed and judicial oppression overthrown.

Criticism of a court after a case has terminated is properly subject to no limitation except the law of libel,³ but discussion that is before or contemporaneous with a trial may be the source of very serious injustice to litigants. Where the jury are allowed full liberty outside of session time, the possibility of misinformation and prejudice is almost unlimited. To keep them in close confinement is not only an unwelcome remedy, but one that is thoroughly inadequate. It leaves untouched the reaction upon the judge himself when his animosity is aroused by press comment, the effect upon the jury before it is impanelled, and also the very powerful indirect forces that reach a jury after the trial begins. In spectacular trials like that of Leo Frank, Thaw, Hattie Le Blanc, or Luetgert, where all the great dailies devote several pages to the testimony, and flaunt daring headlines about the guilt or innocence of the accused, public opinion runs so high that no amount of precaution can prevent its being felt by the jury.

With this in mind the English courts have adopted a strict view which would probably go the full length of forbidding any publication whatever if the necessity seemed strong enough.⁴ Public opinion would not permit our courts to adopt this view. Not only is the mystery of a closed door too much for the American public to endure, but they somehow feel themselves entitled to their breakfast table thrill, as though by immemorial user.⁵ It would be much better to allow unrestricted a *verbatim* report of all the evidence that goes to the jury⁶ coupled with such purely descriptive comment as is reasonable and impartial, and an addition of the arguments on points of law if it is desired. The difficulties which this creates in case a second trial becomes necessary are more than offset by the suspicion which would immediately attach to any court that adopted Star Chamber methods. But any attempt by a newspaper independently to run down clues ahead of their appearance in court, to supplement the trial by the publication of facts not appearing in testimony, to print evidence which the judge rules inadmissible, to report argument on the facts which takes place while the jury are excluded, or to give partisan comment upon the testimony either directly or by the subtle inuendo of headlines should be severely frowned upon and punished by the imposition of heavy fines if necessary. The jurisdiction of the court to punish for contempt should be based upon the character of the acts done rather than on any technical rule about the "presence of the court." If some such dividing line as above suggested could be clearly established, friction between the newspapers and the courts from misunderstandings as to the power of each would be lessened. It would give the public information without partisanship, and would make less frequent the essentially arbitrary remedy of summary process for contempt. If the action of Judge Hand and Judge Killits is followed by similar summary punishment of offenders by other courts, clear rules may eventually be developed for the trial of causes by juries instead of printer's ink.

³ See *Storey v. People*, 79 Ill. 45.

⁴ *King v. Clement*, 4 B. & Ald. 218; *Hunt v. Clarke*, 58 L. J. Q. B. 490, 494.

⁵ See 42 NAT. CORP. REP. 153.

⁶ See *In re Shortridge*, 99 Cal. 526, 34 Pac. 227.

THE OBLIGATION OF AN EMPLOYER TO PROCURE EMERGENCY MEDICAL ATTENTION FOR AN EMPLOYEE INJURED WITHOUT HIS FAULT. — That the law does not seek to enforce moral duties,¹ as such, is axiomatic. The law of torts is concerned merely with restraining one from active conduct likely to injure others. One need not, therefore, move a finger to rescue a stranger from peril,² though, indeed, if he is responsible for that peril because of a breach of legal duty, it behooves him to lessen the evil consequences of an injury that he must pay for. The rare affirmative non-contract duties arise chiefly from certain relations, — such as master and servant, or carrier and passenger,³ — and it is upon the basis of some relational duty, if at all, that we must justify a recent case holding a stone quarry company liable for the negligent failure of its superintendent to summon prompt medical assistance for an employee dangerously injured without the company's fault. *Hunnicke v. Meramec Quarry Co.*, 172 S. W. 43 (Mo.).⁴

Aside from *dicta*,⁵ this case seems the first to determine expressly that an employer has this relational duty when the employee is powerless to help himself. The class of cases most relied on by the principal case holds that certain agents have emergency authority to employ physicians on behalf of the principal, but these are at most *dicta*, for it may well fall within an agent's incidental powers to do certain acts which, though not obligatory upon the principal, are yet to his interest to have performed.⁶ On the other hand, some cases denying such emergency

¹ "It is undoubtedly the moral duty of every person to extend others assistance when in danger. . . . And if such efforts should be omitted by anyone when they can be made, without imperiling his own life, he would by his conduct draw upon himself the just censure and reproach of good men, but that is the only punishment to which he would be subjected by society." Field, J., in *United States v. Knowles*, 4 Sawy. (U. S.) 517, 519.

² An extreme case held that a railroad company had a duty to stop and pick up trespassers run over without its fault. *Whitesides v. Southern R. Co.*, 128 N. C. 229, 38 S. E. 878. This, of course, is at variance with the law in enforcing a purely humane obligation. *Union Pacific R. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281. Cf. *Adams & Reid v. Southern Ry. Co.*, 125 N. C. 565, 34 S. E. 642.

³ See Professor Pound in 25 *INTERN. J. OF ETHICS*, No. 1, ". . . in the law of torts, the existence of some relation calling for care or involving a duty of care is often decisive of liability. . . . In the absence of a relation that calls for action, the duty to be the Good Samaritan is moral only." For a discussion of the relational duty of public servants, see NOTES, p. 620.

⁴ A statement of facts will be found in RECENT CASES, p. 638. It is possible that this case could have gone off on the ground that there was an active misfeasance which "made bad worse," for there was some evidence that a fellow servant was proposing to stop the flow of blood by tying a rope tightly around the leg of the injured man, when the superintendent stopped him, telling him "it would do no good." In such a case even the humble trespasser has rights. *Northern Central Ry. Co. v. State*, 29 Md. 420. But the court treats the case as one of a mere nonfeasance.

⁵ In *Ohio & Mississippi R. Co. v. Early*, 141 Ind. 73, 40 N. E. 257, the legal obligation seems to have been recognized, but was held to have been fulfilled in that case where the employee declined further aid. Likewise, in *Baptiste v. Baptiste*, 130 La. 898, 58 So. 702.

⁶ In *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, it is true the court considered that the emergency authority existed because of the employer's legal duty. But in *Cairo & St. Louis R. Co. v. Mahoney*, 82 Ill. 73, a legal obligation was expressly denied, and the agent's emergency authority was spelled out from various considerations. For a similar view see *Union Pacific R. Co. v. Beatty*, 35 Kan. 265, 268, 10 Pac. 845, 846-7; *Sevier v. Birmingham, S. & T. R. Co.*, 92 Ala. 258, 260, 9 So. 405; *Union Pacific R. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052.

powers would seem to negative a legal duty, for if the employer had an emergency duty to summon assistance it is a fair inference that his highest representative present, performing that duty, had authority to do so.⁷ Furthermore, such a legal obligation seems to have been expressly denied.⁸ But apart from authority, the employer's duty enforced in the principal case is a sane application of the principle underlying those better defined duties of supplying safe appliances, a reasonably safe place in which to work, and competent co-workers. The relational obligation arises because from the nature of things the servant must trust his safety in these respects to his master's care.⁹ Without affirming that the master has a general duty to care for a sick or disabled servant,¹⁰ it may without inconsistency be held that some obligation does exist where a grievous injury has incapacitated the servant from summoning assistance. Being an emergency duty,¹¹ it would extend only to requiring the employer to render such "first aids" as are accessible and, if necessary, to transport the servant to a place where he may get the needed attention.

What are the conditions under which this unusual relational duty should arise? It has been suggested that it should apply only in employments the inherent hazard of which renders grave injuries likely to occur.¹² Though such circumstances would make a stronger case,¹³ it may be doubted whether this obscure line between dangerous and non-dangerous occupations should be the determining factor. Rather should the duty be limited by a twofold inquiry: first, whether the servant, injured in the execution of his employment, is in urgent need of aid which he himself is powerless to procure, and second, whether the work is of such a sort as to give the employer a peculiar ability to render or

⁷ For a more detailed examination of the emergency cases, see LABATT, *MASTER AND SERVANT*, §§ 2003-2004. Many of the cases cited as denying an agent's authority to engage physicians do not appear to have been emergencies. *St. Louis & K. C. R. Co. v. Olive*, 40 Ill. App. 82. In others the question of emergency was not raised, though one apparently existed. *Peninsula R. Co. v. Gary*, 22 Fla. 356. Other cases limit this emergency authority of agents to employments, like railroading, that are especially hazardous. *Holmes v. McAllister*, 123 Mich. 493, 82 N. W. 220. *Cushman v. Clover Land Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759.

⁸ *Makarsky v. Canadian Pacific R. Co.*, 15 Manitoba L. R. 53, 70; *King v. Interstate C. S. R. Co.*, 23 R. I. 583, 51 Atl. 301.

⁹ Professor Bohlen, in an article in 56 AM. L. REG. 217, 334, finds a tendency of the cases to apply "the general principle that whenever the servant must, from the very nature of the employment, encounter perils from which the master alone can protect him, the master owes him a duty to take care to afford him adequate protection."

¹⁰ This was early settled in *Wennall v. Adney*, 3 Bos. & P. 247. But for a striking statutory reversal of this common-law conception, see, for example, the Illinois Workmen's Compensation Act, providing that "the employer shall provide first aid medical, surgical and hospital services, also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200." ILL. REVISED STATS., 1913, p. 1209.

¹¹ "This duty . . . only arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded to save life or prevent great injury. The duty arises with the emergency and with it expires." *Ohio & Mississippi R. Co. v. Early*, *supra*, 141 Ind. 73, 81, 40 N. E. 257, 259.

¹² See the principal case, p. 54, and also *Holmes v. McAllister*, *supra*, 123 Mich. 493, 498, 82 N. W. 220, 221; *Salter v. Nebraska Telephone Co.*, 79 Neb. 373, 376, 112 N. W. 600, 602.

¹³ The typical case is railroading, wherein an employee is likely to be injured far from home, and unable to get aid save through the intervention of the employer.

summon assistance. For instance, if the driver of a delivery wagon is injured in a collision, there would be no duty of relief, for the service is not of a kind that gives the master any special or exclusive control over the situation. And this would be true, even in the fortuitous circumstances that the master was present at the scene.¹⁴ On the other hand, if a domestic servant is helplessly injured in the pursuance of a service presumably beneficial to the master, his isolation inherent in the work compels him to depend upon that protection which the master has the peculiar means to afford.¹⁵

With these elements, it is submitted, the law should impose a relational duty. Although particular cases have sometimes been covered by statute,¹⁶ there is room for a wise application and development of common-law principles in respect to the obligations which are cast upon the employer by this voluntarily assumed relation.

EFFECT OF AN UNACCEPTED PARDON UPON THE PRIVILEGE AGAINST SELF-INCRIMINATION. — The highwater mark of protection accorded the privilege against self-incrimination, supposedly reached by the dissent in *Brown v. Walker*,¹ has perhaps been exceeded in the recent case of *Burdick v. United States*, 236 U. S. 79, 35 Sup. Ct. 267.² In a unanimous decision the Supreme Court held that a witness does not lose his privilege against self-incrimination by being tendered an unconditional pardon which he refused to accept. This result was attained upon the grounds that the validity of a pardon depends upon acceptance;³ that the witness is consequently not technically free from danger of punishment, although he had the means at hand to remove the danger; that he cannot be made to forego his right to refuse the pardon and avoid possible disgrace; and so his privilege still exists.

If the privilege against incrimination is removed, it may well be that the witness will be indirectly forced to accept the pardon. Inasmuch as it is revocable until accepted, if his evidence would disclose a strong case against him, he cannot safely trust to the future good will of the government, but must accept at once. But it is by no means certain that it is illegal to force the acceptance of a pardon. Clearly an accused has no right to demand prosecution, for a *nolle prosequi* may issue without

¹⁴ The moral duty would be strong, but there is nothing in the nature of the relation which could give rise to a legal duty.

¹⁵ The duty not being predicated upon any liability of the master for the initial injury, it matters not whether that injury came from the negligence of a fellow servant, from an "assumed" risk, or was partly due to contributory negligence.

¹⁶ For example, a number of states require medical assistance to be provided for employees injured in mines. See LABATT, MASTER AND SERVANT, § 1890. In South Carolina, a railroad is required to give immediate notice to a physician "most accessible to the place of accident." CIVIL CODE, 1912, § 3228. And it may be remarked that in states where an employer under the Workmen's Compensation Acts must indemnify his employees for all injuries "arising out of and in the course of the employment," prompt and effective steps are apt to be taken to prevent an enhancement of liability.

¹ 161 U. S. 591, 610.

² For a statement of the case, see RECENT CASES, p. 642.

³ *United States v. Wilson*, 7 Pet. (U. S.) 150.

his consent.⁴ Nor can he insist upon punishment after conviction when the state expresses the contrary desire.⁵ So the only objection to enforcing the acceptance of a pardon must be the implication of guilt on the acceptor. A pardon is an "act of grace,"⁶ issuing at any time after the alleged criminal act has been committed.⁷ Perhaps it is true, as it is often said, that since it does not issue on the assumption of innocence, there is an implication of guilt in its acceptance.⁸ But certainly an involuntary acceptance will connote no such disgrace any more than do the immunity statutes, which are held constitutional.⁹ While for the purposes of showing that the time of acceptance determines when a pardon becomes effective and irrevocable, it may be permissible to draw an analogy to a grant or deed,¹⁰ this analogy should not be carried to the illogical extent of losing sight of the true nature of a pardon in holding that its acceptance must be left to the will of the accused. So the objection that a denial of the privilege against incrimination might possibly indirectly thrust a pardon upon the witness is without weight.

In placing so much stress upon the nature of a pardon, there is danger of losing sight of the true character and purpose of the privilege. The privilege against self-incrimination cuts into the general rule, that the state is entitled to the testimony of all its citizens, to the extent necessary to protect the witness from being compelled to bring about his own punishment.¹¹ This privilege does not extend to protection from shame and disgrace that the disclosure of his participation in crime may bring. For example, the privilege is gone, when the Statute of Limitations has run against the crimes his testimony may reveal.¹² Likewise an accepted pardon removes the privilege.¹³ And the statutes requiring testimony by giving immunity have been held constitutional, for by removing the reason for the privilege, it is destroyed.¹⁴ If the witness in the principal case is still open to dangers from prosecution, it is because of his own free will in declining the protection offered by the pardon provided that

⁴ The so-called right of a criminal to a trial and verdict has reference merely to the question whether a later prosecution, after a *nolle prosequi* of the former without his consent, places him twice in jeopardy. See *United States v. Shoemaker*, 27 Fed. Cas., No. 16,279, at p. 1069, 2 McLean (U. S.) 114, 119.

⁵ "If the King pardons a felon, and it is shown to the court; and yet the felon pleads not guilty, and waives the pardon, he shall not be hanged; for it is the King's will that he shall not; and the King has an interest in the life of his subject." Jenk. 139, Case LXII.

⁶ Marshall, C. J., in *United States v. Wilson*, *supra*, 160.

⁷ This point was not passed upon in the principal case, but see in the lower court, *United States v. Burdick*, 211 Fed. 492, 493; *Ex parte Garland*, 4 Wall. (U. S.) 333, 380.

⁸ See *Cook v. Middlesex Co.*, 26 N. J. L. 326, 331; *Manlove v. State*, 153 Ind. 80, 53 N. E. 385.

⁹ *Brown v. Walker*, *supra*.

¹⁰ See *United States v. Wilson*, *supra*; *In re Nevitt*, 117 Fed. 448, 460.

¹¹ The privilege has been given undue emphasis by its incorporation into the federal Constitution and the constitutions of all but two of the states, but this does not change its purpose as a rule of evidence. See Professor Wigmore in 5 HARV. L. REV. 71; 15 *ibid.* 610; WIGMORE, EVIDENCE, §§ 2250, 2251. See *Twining v. New Jersey*, 211 U. S. 78, 102.

¹² *Mahanke v. Cleland*, 76 Ia. 401, 41 N. W. 53. See 5 HARV. L. REV. 24, 27.

¹³ *Queen v. Boyes*, 1 B. & S. 311.

¹⁴ *Brown v. Walker*, *supra*. See *Hale v. Henkel*, 201 U. S. 43.

it is still held open.¹⁵ The reason for refusing the pardon may be the fear of incurring possible disgrace.¹⁶ But even though receiving the pardon throws upon the witness a double disgrace arising not only from the testimony he may give, but also from the acceptance of the pardon, a mere increase in the amount of shame can hardly operate to change the scope and character of the rule.

The force of the argument of the Supreme Court that, — "In this as in other conflicts between personal rights and the powers of government, technical, — even nice, — distinctions are proper to be regarded,"¹⁷ is greatly diminished when balanced against the contention of Judge Hand in the lower court that, — "Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity."¹⁸ And, it is submitted, even the technical reasoning of the Supreme Court breaks down when considered in the light of the true basis for the privilege against self-incrimination.¹⁹

JURISDICTION OF EQUITY TO INTERFERE WITH INTERNAL MANAGEMENT OF FOREIGN CORPORATIONS. — The recent case of *Tolbert v. Modern Woodmen of America*, 145 Pac. 183 (Wash.),¹ brings up the much disputed question as to how far, if at all, a court of equity will interfere in the internal management of a foreign corporation. A foreign mutual life insurance company threatened to cancel the plaintiff's certificate of membership. In a suit against the corporation to enjoin such action, process was served on the local agent authorized to receive service. Relief was refused on the ground, often asserted,² that equity has no jurisdiction to entertain a suit requiring interference with the internal management of a foreign corporation.

Since a corporation exists only by the legislative fiat of the sovereign creating it, its existence must be limited to the territorial jurisdiction of that sovereign.³ In other words, the foreign corporation is not and never has been actually present before the court in which suit is brought.⁴

¹⁵ So a writ of *habeas corpus* was refused a prisoner who had rejected an unconditional pardon, because it was his own voluntary act that kept him confined. *In re Callicot*, 8 Blatch. 89, 95.

¹⁶ If in truth the acceptance is forced upon the witness, then, as has been submitted, no disgrace would ensue.

¹⁷ Justice McKenna in the principal case, p. 94.

¹⁸ *United States v. Burdick*, *supra*, p. 494.

¹⁹ "When, however, the question is of privilege, the witness only needs protection and he is protected when the means of safety lies at hand." Judge Hand in *United States v. Burdick*, *supra*, p. 494.

¹ For a statement of the case, see p. 634 of this issue of the REVIEW.

² See *Wilkins v. Thorne*, 60 Md. 253; *North State Gold & Copper Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Kansas, etc. Construction Co. v. Topeka, S. & W. R. Co.*, 135 Mass. 34; BEALE, FOREIGN CORPORATIONS, § 300. The mere fact that the management of a foreign corporation is involved seems to be taken as conclusive against the jurisdiction of the court. See *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385.

³ See *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 588; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 181; *R. Co. v. Koontz*, 104 U. S. 5.

⁴ See *Smith v. Mutual Life Insurance Co.*, 14 Allen (Mass.) 36; *Matter of Rappley*, 43 N. Y. App. Div. 84, 59 N. Y. Supp. 338.

To-day, however, practically every state has a statutory requirement that foreign corporations, before doing business in the state, shall signify their consent to be sued in the courts of the state, by appointing an agent to accept service of process.⁵ When consent to service is thus given, the actual presence of a corporation is no more necessary to give the court jurisdiction than that of a natural person who had consented in advance and was out of the state at the time of the suit.⁶ If, then, the court has before it a case where the defendant has been duly served with process, and the facts are such that equity would act if the defendant were a domestic corporation, it is submitted that the only question for determining jurisdiction should be whether the court has power to render an effective decree.⁷ If the corporation has property within the jurisdiction, sequestration should be a proper method of enforcing the decree; and, as a practical matter, very effective pressure may be brought to bear on the corporation by a threat to exclude it from the state unless it obeys the decree of the court.⁸

If then the court has jurisdiction, a further and equally important question arises whether the court in its judicial discretion should exercise this jurisdiction. The corporation, it is true, is the creature of the sovereign by whose will it exists. Its capacity and powers, the rights and obligations of its shareholders, and its general management are regulated by the laws of that sovereign.⁹ But since the courts every day interpret and enforce rights acquired under foreign law, the necessity of doing so in this case should in no wise deter the court. There is, of course, the graver difficulty of compelling acts outside the jurisdiction.¹⁰ But this objection is neither more nor less serious in the case of foreign corporations than in other cases. And it does not apply where the acts are to be done within the jurisdiction, or where it is an injunction against doing acts as in the principal case. The feeling that such matters can best be handled by the state of the domicile presents the most formidable barrier in the way of equity exercising its jurisdiction, but sole control by that state does not always lead to satisfactory results under modern conditions.¹¹ Many corporations created in one state transact business in almost every state of the Union; and very often a corporation is created in one state to do business wholly within another. In the former of these cases, it would obviously be unjust to have the

⁵ For a collection of these statutes, see BEALE, *FOREIGN CORPORATIONS*, ch. vii.

⁶ *Montgomery, Jones & Co. v. Liebenthal & Co.*, [1898] 1 Q. B. 487.

⁷ For this test of jurisdiction, see DICEY, *CONFLICT OF LAWS*, 40. For cases allowing decrees against foreign corporations when there were practical means of enforcement, see *Harding v. American Glucose Co.*, 182 Ill. 551; *Richardson v. Clinton Wall Trunk Co.*, 181 Mass. 580, 64 N. E. 400; *Ernst v. Rutherford & Boiling Spring Gas Co.*, 38 N. Y. App. Div. 388, 56 N. Y. Supp. 403; *Prouty v. Michigan, S. & N. Ind. R. Co.*, 1 Hun (N. Y.), 655.

⁸ KANSAS GENERAL STATUTES, 1905, § 3591 (providing for exclusion of corporations unless they obey the decrees of the courts).

⁹ BEALE, *FOREIGN CORPORATIONS*, §§ 301, 304, 305.

¹⁰ For cases ordering affirmative acts abroad, see *The Salton Sea Cases*, 172 Fed. 792; *Miller v. Rickey*, 127 Fed. 573, 218 U. S. 258; *Wiley v. Decker*, 11 Wyo. 476, 73 Pac. 210. But see 17 HARV. L. REV. 572; 23 *id.* 390; 26 *id.* 294.

¹¹ The popular desire to increase the control of the state courts over foreign corporations is shown by legislative attempts to keep them out of the federal courts. See 28 HARV. L. REV. 304.

courts of several different states rendering inconsistent decrees against the corporation especially as all interested parties could not conveniently be joined. Accordingly, matters of actual internal management, such as election of officers, issue of stock, declaration of dividends and distribution of assets might well be left to the courts of the domicile. But, on the other hand, where a corporation has all its property and transacts all its business in the state where suit is brought, the fact that it has been incorporated in another state should not deprive the court of all the powers over it which the court has over domestic corporations. Therefore, it is submitted that the foreign character of a defendant corporation should not be conclusive against the jurisdiction of the court, if an effective decree is possible, but should be merely one of the facts to be considered in determining whether the court can do substantial justice to all concerned.

In the principal case it does not appear whether or not the local court had means of pressure such as to render a decree effective. But even if this were the case, equitable relief was properly refused. The defendant corporation was doing business in a number of states, while the plaintiff was not merely seeking to adjust an insurance claim between himself and the company, but was asserting membership as a shareholder. The rights of all parties could best be determined at the corporate domicile.

IMPLIED AUTHORITY OF THE PRESIDENT TO WITHDRAW PUBLIC LANDS FROM ENTRY. — The recent majority decision of the United States Supreme Court upholding the power of the President to withdraw from entry oil lands which Congress had opened to settlement¹ gives legal sanction to the employment of ordinary business methods in the machinery of government, without disturbing the delicate adjustment of power between Congress and the President. *United States v. Midwest Oil Co.*, Sup. Ct. Off., No. 278 (Feb. 23, 1915). The defendants made entry on the lands withdrawn, after the issuance of the President's order.² While recognizing to the fullest extent that the power over the public domain is lodged primarily with Congress,³ the court works out an implied authorization of Executive withdrawals from long-continued acquiescence by Congress. The result is sustained on principles of agency, as applied in other situations,⁴ and is in no way dependent on any theory that the President has acquired the power by adverse possession.

The government seems to have urged, though apparently not very seriously, that the President, as commander-in-chief of the army and navy, could hold these petroleum lands, as a valuable source of fuel supply, pending action by Congress. As the decision is placed on other grounds, this claim is not denied by the Court, but it seems wholly untenable. Securing an adequate fuel supply, from whatever source, falls

¹ ACT OF FEB. 11, 1897, 20 STAT. 526, R. S. 2319, 2320.

² Temporary Petroleum Withdrawal, No. 5, issued Sept. 27, 1909.

³ CONSTITUTION OF THE UNITED STATES, ART. IV, § 3.

⁴ *Wheeler v. Benton*, 67 Minn. 293; *Tennessee River Trans. Co. v. Kavanaugh Bros.*, 101 Ala. 1.

within the province of Congress to "provide and maintain a navy,"⁵ rather than under the powers of the commander-in-chief. Furthermore, the public lands, the particular source of fuel over which authority is in this instance asserted, are committed to the control of Congress by the Constitution, and the land laws have been passed in pursuance of this power. In no emergency, short of war, can it be said that the power to suspend a duly enacted statute is fairly incidental to the Executive's position as commander-in-chief.

There seems no constitutional objection, however, to Congress delegating by implication the power over the public domain which the President exercised. He may be *expressly* authorized, as an administrative agent with wide discretion, to withdraw public lands from entry.⁶ And although it does not follow as a necessary corollary,⁷ the constitutionality of an implied delegation of power is equally well supported by the authorities⁸ and is tacitly admitted by the dissenting justices in the principal case. But they urge that the implied authority of the President was in this case exceeded, because the acquiescence of Congress has not been established except where the withdrawal was in pursuance of a settled legislative policy, or where the lands withdrawn were the subject of a disputed grant. This classification in fact includes all withdrawals for a public purpose which have come before the courts, but nowhere in the cases is there a suggestion that the implied authority upon which the decisions rely is arbitrarily limited as the dissenting justices suggest. Congress has never disturbed any of over two hundred and fifty Executive orders for land withdrawals for a variety of purposes,⁹ including Indian reservations, military reservations, and bird reservations. Where a grant of land by Congress to a state had uncertain boundaries, and the Executive thought the state might be entitled to a larger claim than proved to be the case, the United States Supreme Court upheld a withdrawal by the President,¹⁰ "in order to give the state the opportunity of petitioning for an extension of the grant by Congress."¹¹ The uniform acquiescence of Congress in the exercise of such varied powers, together with not infrequent appropriations for the use of the lands reserved, lay a solid foundation for the implication of a general administrative agency, with authority adequate to the emergencies which must

⁵ CONSTITUTION OF THE UNITED STATES, Art. I, § 8. It was also pointed out by the dissent that the lands in question being in Wyoming had little connection with naval fuel supply.

⁶ *Spalding v. Chandler*, 160 U. S. 394. The withdrawal was authorized for "public purposes."

⁷ It might be argued that the guardianship of the public domain was a trust which Congress should not be allowed to delegate save by express enactment.

⁸ *Grisar v. McDowell*, 6 Wall. (U. S.) 363.

⁹ The enumeration is taken from the majority opinion and is not denied by the dissenting justices.

¹⁰ *The Des Moines River Cases: Dubuque & P. R. Co. v. Litchfield*, 23 How. (U. S.) 66; *Wolcott v. Des Moines Co.*, 5 Wall. (U. S.) 681; *Wolsey v. Chapman*, 101 U. S. 755.

¹¹ See *Bullard v. Des Moines & F. D. R.*, 122 U. S. 167. Nor can it be validly argued that the withdrawal was necessary in order to protect the state in what the courts might later construe to have been granted it. Had the land withdrawn been in fact previously granted the state, subsequent occupiers, of course, could not have interfered with the state's prior title.

constantly arise in the management of the public domain. Nor does the failure of Congress to ratify the President's act when requested to do so negative the existence of the power in the present instance, in view of the words of the statute passed that it should not be construed as a "recognition, abridgment, or enlargement" of such rights.¹² Furthermore, it is submitted that the question of ratification is immaterial. It could not have related back to the prejudice of intervening rights acquired by settlers between the order and the ratification.¹³

It is clear that the case should not be interpreted as conferring any additional power on the Executive. It is merely a judicial recognition of the fact that Congress is as likely as any other property owner, busy with affairs, to employ a general administrative agent whose authority is implied from the principal's acquiescence.

ENJOINING WASTE TO PROTECT INCHOATE DOWER. — There is a long standing diversity of opinion in the books concerning the nature of the somewhat impalpable right of the wife known as inchoate dower. It has sometimes been maintained that she has a subsisting interest or estate in land,¹ while on the other hand it is also postulated that the wife had in no sense an interest, but merely an inchoate right of action.² A recent New York case makes pertinent the question whether this jejune inquiry is of any practical importance. *Rumsey v. Sullivan*, 150 N. Y. Supp. 287 (App. Div.). In a suit by the wife to protect her inchoate dower, the court refused to enjoin waste by the grantee of the husband who took by a conveyance in which the wife did not join, and who was exploiting the land for oil by opening new wells and using wells he had already opened.³ The only other case that has been found upon the subject is one in South Carolina, which granted an injunction where the husband's assignee was clearing the land of timber.⁴

It is certain that regardless of the view taken as to the nature of inchoate dower, the courts have given it substantial protection in many instances. A wide variety of remedies have been made available to the wife when an alienation has been fraudulently secured by the husband without her consent, or when her consent has been obtained by fraud.⁵ Whenever outsiders are to acquire a new interest in the realty, either by act of the parties or by operation of law, the wife's interest is recognized

¹² ACT OF JUNE 25, 1910; 36 STAT. 847.

¹³ *Taylor v. Robinson*, 14 Cal. 396; see *Cook v. Tullis*, 18 Wall. (U. S.) 332, 338.

¹ See *Simar v. Canaday*, 53 N. Y. 298, 304; 2 SCRIBNER, DOWER, 6 *et seq.*; 20 HARV. L. REV. 407.

² See *Moore v. City of New York*, 8 N. Y. 110, 113; 4 COUNSELLOR, 199, 200; TIFFANY, REAL PROPERTY, § 197.

³ For a statement of the case, see RECENT CASES, p. 630.

⁴ *Brown v. Brown*, 94 S. C. 492, 78 S. E. 447.

⁵ Further transfer may be enjoined. *Brown v. Brown*, 82 N. J. Eq. 40, 88 Atl. 186. A judgment may be opened so that she can intervene. *Waterhouse v. Waterhouse*, 206 Pa. St. 433, 55 Atl. 1067. If execution sale brings only a nominal sum, a constructive trust will be imposed on the assignee. *Buzick v. Buzick*, 44 Ia. 259. A deed in which she was led to join by fraud may be cancelled of record. *Clifford v. Kampfe*, 147 N. Y. 383. Or she may have damages at law for misrepresentation. *Simar v. Canaday*, *supra*.

as having present value, and if necessary, steps are taken to preserve this to her.⁶ An impressive list of the kinds of protection given might be compiled,⁷ and no doubt each instance might be adequately explained either on the ground that she has an interest in realty or that social necessity requires a preservation of her rights, of whatever nature they may be.⁸ Nor does the fact that the wife may not assign her dower⁹ tend materially to show that it is not an estate, for the contingent remainder, long recognized as an estate, was not assignable at common law.¹⁰ At the most, the names fastened upon inchoate dower are merely indications of the temper of the particular court and the extent to which it might afford protection.

The enjoining of waste, likewise, does not call for a determination of this mooted question. Equity, of course, looks at the substance and disregards the formal attempts at meticulous cataloguing made by the law courts. Thus waste may be enjoined by a life tenant,¹¹ or by a remainderman when preceded by an intervening estate,¹² although no remedy exists for such estates at law. If in substance it appears that the holder of the land is using it to an extent beyond what can properly be presumed to have been given him,¹³ equity stops the abuse. The wife, whatever she has now, will, on the arising of a contingency, have an estate in the land. Her interest is substantially like a life estate in one-third of the realty, splitting the husband's estate in fee, as it were, into a precedent life estate and a subsequent remainder in fee,¹⁴ or even more similar to an executory devise for life on the happening of a contingency.¹⁵ As these estates are protected from waste,¹⁶ equity should likewise see to it that the value of inchoate dower, whatever its legal status, should not be destroyed. It is true that the husband himself is unimpeachable for

⁶ Release of inchoate dower is valid consideration. *Bullard v. Briggs*, 24 Mass. 533. Redemption at tax sale may be based upon it. *Henze v. Mitchell*, 93 Neb. 278, 140 N. W. 149. It will constitute breach of a covenant against incumbrances. *Russ v. Perry*, 49 N. H. 547. In partition it cannot be cut off unless the wife is made a party. *Greiner v. Klein*, 28 Mich. 12. In condemnation proceedings and in mortgage foreclosure a share of the proceeds must be set aside for the wife. *In re New York and Brooklyn Bridge*, 75 Hun 558, 27 N. Y. Supp. 597. *Vreeland v. Jacobus*, 19 N. J. Eq. 231. *Contra*, *Kauffman v. Peacock*, 115 Ill. 212. Adverse possession for the statutory period in the lifetime of the husband will not prejudice the interest of the widow at his death. *Lucas v. Whitacre*, 121 Ia. 251, 96 N. W. 776; *Winters v. De Turk*, 133 Pa. St. 359, 19 Atl. 354.

⁷ *E. g.*, see TIFFANY, REAL PROPERTY, § 197; 20 HARV. L. REV. 407.

⁸ For a discussion of the strong public policy which led to the establishment of dower and the high protection which the courts have therefore given it, see 1 SCRIBNER, DOWER, 20.

⁹ See *Johnston v. Vandyke*, 13 Fed. Cas., No. 7,426, p. 894; *Mason v. Mason*, 140 Mass. 63.

¹⁰ See 28 HARV. L. REV. 191.

¹¹ *Molineaux v. Powell*, 3 P. Wms. 268 n. (F.).

¹² *Anonymous*, Moore, 554, pl. 748; *Perrot v. Perrot*, 3 Atk. 94.

¹³ For an excellent discussion of the grounds on which equity enjoins waste, see Lord Campbell's opinion in *Turner v. Wright*, 2 DeG. F. & J. 234.

¹⁴ *Cf.* statements in the cases such as in *Mason v. Mason*, *supra*, p. 63, "... the inchoate right of dower is a vested right of value dependent on the contingency of survivorship. ..."

¹⁵ *Cf.* *Bullard v. Briggs*, *supra*, p. 539, "It [dower] is more than a possibility and may well be denominated an contingent interest."

¹⁶ Life estate: see note 12 *supra*; executory devise: *Turner v. Wright*, *supra*.

waste.¹⁷ But this is due no doubt to the wife's incapacity at common law to sue her husband, and now even after statutory emancipation this long-established privilege of the husband would probably continue on grounds of policy. But the grantee of the husband would not be protected by any such procedural bar or by considerations of domestic welfare.

Although in the principal case the court expressed itself strongly against enjoining waste, the case was fortified by the fact that the grantee was merely committing ameliorating waste.¹⁸ In the case of a life estate or executory devise the courts will enjoin only equitable waste,¹⁹ that is, a use beyond what a prudent manager would do with his own property. As the wife's interest is certainly no more substantial than these estates, the principal case may be supported because of the absence of equitable waste. However, as dower differs from other cases in that it arises by action of law rather than the intent of the parties, it may be that the policy of the law which creates it would favor protection from legal waste as well. Whatever may be the final result, the two cases that have arisen certainly would not go to this extent.²⁰

THE TAXING POWER AND THE JURISDICTION OF THE COURTS. — That judicial tribunals in the absence of statute are without jurisdiction themselves to exercise the taxing power has again been demonstrated in a case lately certified to the United States Supreme Court. *Yost v. Dallas County*, 35 Sup. Ct. 235.¹ The holder of county bonds, entitled to have a tax assessed, levied, and collected on his behalf, had recovered an uncollectible judgment,² but, although none but ministerial acts were required to raise the tax,³ enforcement by the statutory remedy "by man-

¹⁷ This is stated in TIFFANY, REAL PROPERTY, § 197, and extended also to "other persons." None of the cases cited, however, are in point.

¹⁸ No wells had been sunk at the time the husband conveyed to the defendant. The dower tenant is entitled to operate only the mines or wells that were opened in the husband's lifetime. *Stoughton v. Leigh*, 1 Taunt. 402; *Coates v. Cheever*, 1 Cow. 460. The defendant, therefore, by opening wells was doing that which alone gave the wife any valuable interest in the deposits. Nor did it appear that the wells which the defendant had already opened were being used in any but a normal way.

¹⁹ See cases in notes 12 and 16 *supra*.

²⁰ The South Carolina case, *supra*, note 4, seems to limit its decision to cases of equitable waste. Furthermore, instead of enjoining waste as to one third of the estate, it permitted waste up to the present value of inchoate dower as figured on expectancy tables by the rule suggested in *Jackson v. Edwards*, 7 Paige (N. Y.) 386, 408. As this value would be less, — probably much less, — than one third of the estate, this anomalous further limitation on the wife's rights seems indefensible.

¹ The case is stated with greater detail in this issue of the REVIEW, p. 640. The opinion of the court was delivered by Holmes, J. McKenna, J., and Pitney, J., dissented.

² This was the proper procedure. The validity and extent of the claim should be determined by judgment, and such judgment must be found incapable of satisfaction, before attempting the remedy by mandamus. See *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535; *City of Galena v. Amy*, 5 Wall. (U. S.) 705; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166, 193; *Walkley v. City of Muscatine*, 6 Wall. (U. S.) 481.

³ As to what is a ministerial act, see TAPPING, MANDAMUS, 171 *et seq.*; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1489. *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653; *Riverside City v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Rice, etc., Co. v. Worcester*, 130 Mass. 575; *Hull v. Oneida County*, 19 Johns. (N. Y.) 259; *Friel v. McAdoo*, 181 N. Y. 558.

damus or otherwise" in the county circuit court ⁴ to command the appropriate taxing officers to act was not successful owing to resignation or evasion of service. Accordingly, the plaintiff asked that the federal court in equity appoint a commissioner or receiver to collect the tax. It had been found as a conclusion of law that "the plaintiff is utterly remediless at law."⁵ The Supreme Court denied jurisdiction in the absence of authorizing statute, and was clearly governed by previous decisions of its own.⁶

It should be noted that theoretically further legal weapons were available to the plaintiff. Mere refusal to comply could not render the proceedings futile.⁷ Neither could resignation, as mandamus would lie against the electing or appointing power to fill the vacancy.⁸ Should this successor decline to serve, mandamus again would lie to compel acceptance of the office.⁹ Throughout these proceedings at law it will be observed that the court would not be administering the tax, but the officials themselves, whom the court would be holding to the proper performance of their duties. Nevertheless, mandamus might be an arduous and impracticable, and, in that sense, an "inadequate," legal remedy.¹⁰ It does not, however, follow that equity of its own volition may concoct a new and more satisfactory one of its own.¹¹ The subject must come within one of the heads of equity jurisdiction, — an equitable right or interest must be found.¹² Thus, equity will not relieve against non-compliance with an undoubted condition precedent ¹³ nor against the accidental failure to make a promised testamentary disposition.¹⁴ Con-

⁴ Mo. R. S. 1909, § 11417, provides, "No other tax for any purpose shall be assessed, levied, or collected except under the following limitations and conditions," and thereupon sets forth a procedure to obtain an order for the tax in the county circuit court which "shall enforce such order by mandamus or otherwise."

⁵ It seems proper to observe that, strictly speaking, the remedy at law by mandamus cannot be made inadequate by mere refusal to comply with the alternative writ, for a peremptory writ would then issue, potentially enforceable by the entire *posse comitatus* of the state.

⁶ *Rees v. City of Watertown*, 19 Wall. (U. S.) 107, 116; *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655, 661; *Barkley v. Levee Commissioners*, 93 U. S. 258; *Meriwether v. Garrett*, 102 U. S. 472, 501; *Thompson v. Allen County*, 115 U. S. 550, 558.

⁷ See n. 5, *supra*.

⁸ Election: *Rex v. Mayor of Cambridge*, 4 Burr. 2008; *Rex v. Mayor of Abington*, 1 Ld. Raym. 561; *People v. Fairbury*, 51 Ill. 149; *State ex rel. McGregor v. Young*, 6 S. D. 406. See TAPPING, MANDAMUS, 179 *et seq.*; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., §§ 1495-6.

Appointment: *Rex v. Milverton*, 3 A. & E. 284; *The King v. Horton*, 1 T. R. 374; *cf. Lamb v. Lynd*, 44 Pa. St. 336. See TAPPING, MANDAMUS, 63, 70, 89, 205; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1497.

⁹ See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 415; 4 *id.*, § 1498. *City of London v. Vanacker*, 1 Ld. Raym. 496; *The King v. Bower*, 2 Dowl. & R. 842; *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 33 N. E. 849. Any argument to the contrary that in this country man seeks the office, and not office the man, it is submitted, is untenable.

¹⁰ It is easy to conceive that the remedy might have been insufficient from the outset, and, in that sense, truly "inadequate."

¹¹ See 1 STORY, EQUITY JURISPRUDENCE, 13 ed., §§ 60-1; 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., §§ 132-3; *Rees v. City of Watertown*, *supra*, p. 121; *Heine v. Levee Commissioners*, *supra*, p. 660.

¹² 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 133.

¹³ *Popham v. Bampfieild*, 1 Vern. 79, 83; *Lord Falkland v. Bertie*, 2 Vern. 333.

¹⁴ *Whitton v. Russell*, 1 Atk. 448.

sequently, here, private property not being liable for the debts of the county,¹⁵ the requisite equitable interest is not apparent.¹⁶

But even if equity jurisdiction might be invoked upon one of the usual grounds or solely because of inadequacy of the legal remedy, there are other obstacles in the way of relief. "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."¹⁷ However unjust or inappropriate the existing remedies, for the judiciary to undertake its exercise unbidden would be sheer usurpation.¹⁸ Should there be found, however, such a statutory authorization by the state under whose authority the bonds were issued, there would, of course, be no objection to judicial action. But the Supreme Court has never declared more than one statute to contain such an invitation.¹⁹ It is also fundamental that the sovereign can be sued only by consent.²⁰ To be sure, if a claim against a municipal corporation be accompanied in its inception by a legislative enjoiner that the debtor meet the obligation by tax, that mandate, as a subsisting remedy coeval with the agreement, becomes virtually irrevocable in relation to this

¹⁵ It is only in the New England states that a private citizen's property may be levied on to satisfy a debt of the municipality. *Hawkes v. The Inhabitants of the County of Kennebeck*, 7 Mass. 461, 463; *Chase v. Merrimack Bank*, 10 Pick. (Mass.) 564; *Eames v. Savage*, 77 Me. 212; *Beardsley v. Smith*, 16 Conn. 368; *Rees v. City of Watertown*, *supra*, p. 122. See 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 992; 4 *id.*, §§ 1506 n., 1507 n., 1639 n. The point presented by the principal case, therefore, would not arise in those jurisdictions.

¹⁶ It is appreciated that a court has ordered the appointment of a commissioner under circumstances analogous to those of the principal case. See *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 130, 29 Fed. Decis. 608; city trustee of drainage fund: *Wilder v. City of New Orleans*, 67 Fed. 567. In *Garrett v. City of Memphis*, 5 Fed. 860, the court would have preferred such a result, but was governed by the United States Supreme Court view expressed in *Meriwether v. Garrett*, *supra*. See also 23 HARV. L. REV. 647 for an argument in favor of equitable relief.

But in *Wadley v. Lancaster*, 122 Ga. 354, 52 S. E. 335, a promissory note was given by a municipality for property purchased by it. The indorsee of the note was not allowed to have a receiver appointed to take possession of, and sell, the property. See 5 McQUILLIN, MUNICIPAL CORPORATIONS, § 2239.

¹⁷ *Waite, C. J.*, in *Meriwether v. Garrett*, *supra*, 501. This enunciation of the United States Supreme Court may need further explanation. See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 595 n. But it nevertheless constitutes a most accurate text of what has been the attitude of that tribunal when confronted by an appeal to the courts to order an assertion of the taxing power. See *Rees v. City of Watertown*, *supra*, p. 116; *Heine v. Levee Commissioners*, *supra*, p. 661; *Thompson v. Allen County*, *supra*, p. 558.

¹⁸ *HIGH, RECEIVERS*, 4 ed., § 403 a.

¹⁹ *Supervisors v. Rogers*, 7 Wall. (U. S.) 175. An Iowa statute contained the provision that "the court may . . . direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court." A marshal was appointed commissioner to levy a county tax to pay bonds where the board of supervisors failed to do so. Of this case, *Bradley, J.*, in *Barkley v. Commissioners*, *supra*, 265, said, "But we have never gone beyond this case, which depended on the special law referred to." The decision in *Supervisors v. Rogers*, in the light of the subsequent decisions of *Rees v. City of Watertown*, *supra*, and *Heine v. Levee Commissioners*, *supra*, is criticised in 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 2699 n.

For a similar state decision, see *State v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

²⁰ See cases *supra*, n. 2 and *infra*, n. 21.

Moreover, the prescribed procedure for raising the tax must be closely complied with to render the tax valid. *City of Kansas v. Hannibal & St. Joseph R. Co.*, 81 Mo. 285; *St. Louis & San Francisco Ry. Co. v. Apperson*, 97 Mo. 300.

transaction, by force of the contract clause of the Constitution.²¹ Yet only those rights conferred by a state at the time of contracting are preserved, and these are no broader than the state has conceded.²² Here the paramount authority had given the creditor the undoubted, but not unrestricted, right to have the county circuit court enforce its order "by mandamus or otherwise." This is construed as conceding power only to order the proper officials to levy taxes,²³ and it might also be construed as giving consent to be proceeded against solely in the county court. Although where statute gives "a court" authority to collect a tax, federal courts have not hesitated to act,²⁴ nevertheless, a clearly expressed restriction confining the remedy against the sovereign to a state court might furnish another insuperable obstacle to federal jurisdiction in a case like the one in question.²⁵

THE RELATIONAL DUTY OF THE PUBLIC SERVICE COMPANY TO ITS PUBLIC. — In a recent New York decision, recovery was refused a traveller on a railroad because there was no contract of carriage upon which to base a suit. *Robinson v. New York, N. H. & H. R. Co.*, 150 N. Y. Supp. 925 (App. Div.).¹ The decision raises the question of whether the obligation of the public service company to its public is based on contract or on a relation between the parties because of which the law imposes certain duties upon them. Sir Henry Maine in the middle of the last century wrote that the society of his day was chiefly to be distinguished from that of the previous generation by the largeness of the sphere occupied in it by the law of contract as opposed to that of status.² But Professor Pound has shown that the law of to-day is abandoning this nineteenth-century idea of the supremacy of contract and is, instead, further developing the older conception which goes back for its source to the Year Books.³ In no field of the law has there been more striking

²¹ THE CONSTITUTION, Art. I, sec. 10, cl. 1. *Von Hoffman v. City of Quincy*, *supra*. See *Bronson v. Kinzie*, 1 How. (U. S.) 311, 317; *Edwards v. Kearzey*, 96 U. S. 595, 607; *Louisiana v. New Orleans*, 102 U. S. 203, 206; *Mobile v. Watson*, 116 U. S. 289; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 414-5.

²² See n. 20, *supra*.

²³ The statute in question was originally passed in 1879, and came before the Supreme Court in *Seibert v. Lewis*, 122 U. S. 284, 291, 298. See cases *supra*, n. 20.

²⁴ See *Supervisors v. Rogers*, *supra*; *Stansell v. Levee Board of Mississippi*, Dist. No. 1, 13 Fed. 846; *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. 718, 721.

²⁵ In the principal case, however, mandamus seems to have issued from the federal district court prior to the present suit.

¹ For a statement of the case, see RECENT CASES, p. 626.

² MAINE, ANCIENT LAW, 4 ed., ch. 9.

³ POUND, A FEUDAL PRINCIPLE IN MODERN LAW, 25 INTERN. J. OF ETHICS, No. 1. "The Roman idea of a legal transaction which the nineteenth century sought to apply to all possible situations, was regarded as the legal institution of the maturity of law. But the conception of a legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth century America such a conception sufficed. In the industrial and urban society of to-day, classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not lose for us the contribution of the feudal law to our legal tradition. In its idea of relation, in the characteristic common law mode of treating legal problems which it derived from the analogy of the incidents of feudal tenure we have a legal institution of capital importance."

evidence of this swing from the contractual back to the relational than in that of public service. A legion of cases reported in the century before Elizabeth show how clearly the courts then based their recovery on the character of the profession of the public servant rather than on his agreement.⁴ But in the centuries that followed, the law of public callings almost disappeared except that of innkeepers and carriers, which continued within fixed rules, and when in the nineteenth century its great modern development began, the earlier principles were largely forgotten and the law was often phrased solely in terms of what the parties had agreed to do.⁵ At the present time the courts are unwilling to confine this branch of the law within the bounds of contract, so that while decisions still often sound in its phrases, — the results themselves are inconsistent with that explanation.⁶

No matter what language the courts may use, it seems clear on a survey of the law, that the great body of rules governing public callings are not based upon contract. Obligations are imposed upon those engaged in such pursuits by numerous statutes, as for example the laws passed by Congress regulating interstate commerce,⁷ — obligations which must be fulfilled regardless of the will of the parties in entering the relation. Although in construing one of these statutes, the Supreme Court was at first able to say that its provisions were "implied" terms of the contract,⁸ when confronted with a case in which no contract could be worked out, they rested their decision squarely on the ground of a relational duty irrespective of agreement.⁹ At common law, without the aid of statutes, the courts enforce liability in the very face of attempted contracts such as ones limiting liability of a carrier for negligence of its servants.¹⁰ Private persons could make such contracts, but the status of a public servant fixes his duties and imposes this disability. It is the veriest truism that a public servant is bound to serve all who apply, at reasonable rates, providing them with adequate facilities, and to do all this without discrimination. Even if agreements are made in accordance

⁴ *Anon.*, Keilw. 50, pl. 4. "Note that it was agreed by all the court that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not depend upon agreement." Numerous other cases showing the way the early law regarded public callings have been translated in WYMAN, PUBLIC SERVICE CORPORATIONS, ch. 1. Of these see especially Y. B. 22 Edw. IV. 49, pl. 15; Y. B. 19 Hen. VI. 49, pl. 5; Y. B. 39 Hen. VI. 18, pl. 24.

⁵ This view was never more concisely expressed than in *Pounder v. Northeastern Ry.*, [1892] 1 Q. B. 385, when Smith, J., asked, "What is the duty of a railway to its passengers?" and answered, "It arises out of the contract. . . ."

⁶ "The carrier's contract is to protect the passenger against all the world." *Craher v. Chicago & N. W. Ry.*, 36 Wis. 657, 673. There is of course no such term in the actual contract between the parties. This is part of the duty which the law imposes on the carrier.

⁷ *E. g.*, the HEPBURN ACT, June 29, 1906, c. 3591, 34 STAT. 584.

⁸ *Kansas, etc. Ry. Co. v. Carl*, 227 U. S. 639, more particularly at 650; see also *Missouri, etc. Ry. v. Harriman*, 227 U. S. 657.

⁹ *Boston, etc. Ry. v. Hooker*, 233 U. S. 97. The language in the majority decision on the subject of duties imposed by the statute is excellent. The correctness of the result, however, in applying the general principles to the facts of the particular case was criticised in 27 HARV. L. REV. 737.

¹⁰ *New York Central R. v. Lockwood*, 17 Wall. (U. S.) 357. The cases to the contrary are influenced by the ordinary doctrines as to contracts. See *Mynard v. Syracuse, B. & N. Y. R.*, 71 N. Y. 180.

with these enforced duties and without attempt at contractual evasion, the obligations are thus imposed by law from the relation of patron and public utility and do not arise from the will and intent of the parties. It becomes apparent that contract can exist in this part of the law only so far as it does not conflict with the paramount duty of the public servant to the public.¹¹

In view of these principles, the present case sounds the note of mid-Victorian individualism in its most objectionable form. A traveller surrendered her ticket to the conductor of the first of two railroads over which she was making a through trip and neglected to receive a voucher in return. The ticket, which was offered *bonâ fide* and accepted without objection, was not in fact good. Recovery for physical suffering caused by insults from the conductor of the defendant second railroad was refused on the ground that there was no contract on which to base an action. It may be admitted that the defendant's conductor could have ejected the plaintiff upon her inability to produce a voucher if she refused to pay her fare.¹² But permitting her to remain and then insulting her is indefensible, for she had the same right to be protected from the insults of the defendant's servants as any other person rightfully on the train.¹³ To place the victim of a mistake in the position of a trespasser is indeed an unfortunate result, and shows in what a position the law finds itself when it abandons the conception of status and adopts that of contract.

¹¹ Three recent cases show various methods of approach to this problem. In *Middleton v. Whitridge*, 52 N. Y. L. J. 1621 (N. Y. Ct. of App.), the court held that there was an added duty imposed on a carrier to care for a passenger who became sick on the journey. It was said that "that duty springs from the contract to carry safely" but that "of course the carrier is not bound" without notice. Such a distinction shows that the "contract" the court is talking about is only the duty imposed by the law. The Supreme Court of Arkansas in an analogous case, *Weirling v. St. Louis, I. N. & S. R.*, 171 S. W. 901, laid no emphasis on the contract of carriage, but the duty of the carrier is put rather on relational grounds. And in *Gilkerson v. Atlantic Coast Line R. Co.*, 83 S. E. 592 (S. C.) it was held that there was a duty upon a carrier to wake a passenger in order to allow him to alight at his destination when the conductor had agreed to do this.

¹² See *Delaware, L. & W. Ry. v. Bullock*, 60 N. J. L. 24, 36 Atl. 773, "The right of the company was to refuse to carry him under existing conditions."

¹³ See *Delaware, L. & W. R. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, "The duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments." And see *Marshall v. York, N. & B. Ry.*, 11 C. B. 655; *Carroll v. Staten Island R.*, 58 N. Y. 126. The person injured need not be a "passenger" in order to recover. *Bradford v. Boston & Maine R.*, 160 Mass. 392, 35 N. E. 1131. It is enough to make the carrier liable that the person injured was rightfully there. See *Hale v. Grand Trunk Ry.*, 60 Vt. 605, 15 Atl. 300; *Philadelphia & Reading R. v. Derby*, 14 How. (U. S.) 468. It is a general rule of railroads that persons need not purchase tickets until after they get on the train, and yet they have all the rights of passengers before fare is collected.

RECENT CASES

AGENCY — NATURE AND INCIDENTS OF THE RELATION — SALE BY AGENT TO HIMSELF. — The defendant employed the plaintiff as agent to sell land at a certain minimum price, the agent to have as commission everything above that price. The plaintiff tendered the price himself and asked for a conveyance, but the defendant refused. The plaintiff now seeks specific performance. *Held*, that specific performance will be granted. *Hulton v. Sherrard*, 150 N. W. 135 (Mich.).

An agent owes the highest duty of loyalty to his principal, and therefore an agent to sell cannot himself become the buyer. *McNutt v. Dix*, 83 Mich. 328, 47 N. W. 212; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236. It has been suggested, however, that where the price is fixed and leaves the agent no discretion he may act for both buyer and seller. See *Empire State Ins. Co. v. American Central Ins. Co.*, 138 N. Y. 446, 449, 34 N. E. 200, 201. Whatever may be the merits of such a doctrine, the principal case seems unimpeachable. By express agreement the agent was to act for himself after the price stipulated for by the principal was reached, and accordingly, he had no interest against his duty. To say that the contract should be voidable because the agent might be tempted to sell to an unwelcome purchaser would be entirely too fanciful an objection. *Synott v. Shaughnessy*, 2 Ida. 111, 7 Pac. 82.

BANKS AND BANKING — COLLECTIONS — LIABILITY OF COLLECTING BANK IN GARNISHMENT PROCEEDINGS. — The defendant deposited in the A bank for collection a draft drawn on the plaintiff payable to the bank. The A bank credited the amount to the defendant's account, which was already overdrawn, and sent the draft to the B bank which collected from the plaintiff. The plaintiff then sued the defendant and garnished the B bank. The A bank intervened and claimed the fund. *Held*, that the A bank is entitled. *Scott v. McIntyre Co.*, 144 Pac. 1002 (Kan.).

The question whether the deposit of paper in a bank for collection creates the relation of debtor and creditor, or of agent or trustee, is largely one of fact. One view is that *primâ facie* the bank becomes an agent for collection. *Balbach v. Frelinghuysen*, 15 Fed. 675. See 18 HARV. L. REV. 300; 28 *id.* 205. The weight of authority, however, appears to be that, at least under the circumstances of the principal case, the relation is that of debtor and creditor. *Metropolitan National Bank v. Loyd*, 90 N. Y. 530; *Burton v. United States*, 196 U. S. 283. Under the latter view the decision is clearly right, for the bank takes the draft as its own and is entitled to the proceeds. On the former hypothesis, the situation is somewhat more complicated. Some courts hold that the collecting bank is a sub-agent, and give the depositor a direct legal right against it. *First National Bank of Circleville v. Bank of Monroe*, 33 Fed. 408. See *San Francisco National Bank v. American National Bank*, 5 Cal. App. 408, 90 Pac. 558. On the other hand, it is sometimes said that the depositor has only an equitable right. See *Naser v. First National Bank*, 116 N. Y. 492, 499, 22 N. E. 1077, 1078. This would seem the correct view, for the depository bank is in effect the trustee of the claim for the depositor. See 18 HARV. L. REV. 300. The Kansas statute, however, allows garnishment of credits in which 'he principal defendant may be interested up to the extent of his interest. KAN. GEN. STAT., § 5835. This would seem to cover a case where the interest is equitable. But since the depositor must work out his rights through the depository bank, the garnishing creditor would on any theory be postponed to

the depository, whose lien in the principal case in fact exceeded the sum collected.

BILLS AND NOTES — CHECKS — NEGLIGENCE OF DRAWER: NEGLIGENT USE OF PROTECTOGRAPH. — A bank check for three dollars, otherwise properly drawn, was negligently stamped with a protectograph, "Not over \$500." The payee raised the check to three hundred and sixty dollars and indorsed it to a *bonâ fide* purchaser, who now sues the drawer to recover the face value of the check. *Held*, that he can recover. *Second National Bank of Vincennes v. Campbell*, Ct. App., Hamilton County, Ohio (not yet reported).

If a check or other negotiable instrument is drawn in such a way as to suggest and facilitate the making of alterations which cannot be detected on inspection, a *bonâ fide* purchaser of the altered instrument may recover the full face value. *Garrard v. Haddan*, 67 Pa. St. 82; *Harvey v. Smith*, 55 Ill. 224; see *Young v. Grote*, 4 Bing. 253. *Contra*, *Knoxville National Bank v. Clark*, 51 Ia. 264; *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559. In the United States the authority to the contrary limits recovery to cases where the relation of banker and customer exists. See *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 201; 2 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 1405. But a protectograph stamp is not an essential of a properly drawn check. It is in the nature of the marginal figures, which are not an integral part of the instrument. *Smith v. Smith*, 1 R. I. 398; *Garrard v. Lewis*, 10 Q. B. D. 30. See 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 86. The case is thus not to be judged as if the bank was guilty of negligence in omitting to stamp the draft, "Not over \$5." If the drawer had left the perfectly drawn instrument unstamped, he clearly would not have been liable. *Dana v. Underwood*, 19 Pick. (Mass.) 99; *Smith v. Chester*, 1 T. R. 654. And yet the forger could then have forged the alteration with equal ease and added a protectograph stamp to confirm his forgery. The mere presence of the protectograph, furthermore, cannot be said to have facilitated the alterations, for it was still necessary for the forger himself to erase parts of the existing instrument. By drawing the check properly in all its essential elements, the drawer satisfied his duty to the purchaser; the mere fact that in taking an unrequired precaution to safeguard his own interests, he acted without due care in attaching the protectograph stamp, should not make him liable to a purchaser who placed an uninvited reliance upon the same safeguard. Accordingly the decision in the principal case must be deemed wrong.

BILLS AND NOTES — DEFENSES — RELEASE OF SECURITY BY PAYEE WITHOUT ASSENT OF SURETY CO-MAKER — NEGOTIABLE INSTRUMENTS LAW. — The defendants signed a note as surety co-makers. The principal co-maker gave the plaintiff payee a deed of trust on land as security. The plaintiff, with notice of the suretyship relationship and without the assent of the defendants, released this security. *Held*, that the plaintiff cannot recover. *Long v. Shafer*, 171 S. W. 690 (Mo. App.).

The court reaches this result on the ground that a payee cannot be a holder in due course, and that under Section 58 of the Negotiable Instruments Law the instrument is therefore "subject to the same defenses as if it were non-negotiable." At common law, of course, any binding extension of time or release of security by a holder with notice of the suretyship would give a defense to the surety co-maker. *German Savings Ass'n v. Helmrick*, 57 Mo. 100; *Cummings v. Little*, 45 Me. 183; see 59 U. OF PA. L. REV. 532; 1 BRANDT, SURETYSHIP, 3 ed., § 38. But under the Negotiable Instruments Law it has been held that Section 192, making an accommodation maker primarily liable, and Sections 119 and 120, specifying extension of time as a method of releasing a party secondarily liable and not mentioning it for one primarily liable,

have altered the law. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679; *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514; *Cowan v. Ramsey*, 140 Pac. 501 (Ariz.). See 28 HARV. L. REV. 102. Apparently only one other court has, like the principal case, relied on Section 58 to release the surety. *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50. To relieve the surety, however, on the ground that a payee cannot be a holder in due course is unfortunate. The weight of authority at common law and under the English and American statutes is to the contrary. *Watson v. Russell*, 3 B. & S. 34; *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *Lloyd's Bank, Ltd. v. Cooke*, [1907] 1 K. B. 794, 806; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646. See 15 HARV. L. REV. 579; 16 *id.* 596. A better method of reaching the desired result would be to hold frankly that Sections 119 and 120 do not apply. Cf. *Farmer's Bank of Wickliffe v. Wickliffe*, 134 Ky. 627, 121 S. W. 408. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., 117. Such a course would be particularly justifiable in this case, as a release of security, unlike an extension of time, is not specifically mentioned in Section 120. Probably the best solution, however, would be to eliminate two sections which so inadequately attempt to codify the law of suretyship and leave the situation as it was at common law. See 14 HARV. L. REV. 241, 254; 16 *id.* 255, 259; 59 U. OF PA. L. REV. 532, 542.

BONDS — NEGLIGENT REISSUE BY OBLIGOR UNDER FORGED INDORSEMENT: RIGHTS OF *BONÂ FIDE* PURCHASER. — Executors owned bonds transferable only by indorsement and surrender. A thief stole the bonds, and by forging the indorsement, secured a reissue from the obligor in the name of one of the executors. The thief then forged the signature of this executor, and sold the bonds to a *bonâ fide* purchaser, who secured new bonds from the obligor in his own name. The obligor was found to be negligent in not discovering the forgery when the bonds were presented for the first reissue, but not in reissuing bonds to the purchaser. *Held*, that the executors are entitled to the bonds; but that the obligor, because of his negligence, must reimburse the purchaser. *Chester County, etc. Co. v. Securities Co.*, 150 N. Y. Supp. 1010 (App. Div.).

The transfer of bonds or notes under a forged indorsement of course passes no title even to a *bonâ fide* purchaser. *Dana v. Underwood*, 19 Pick. (Mass.) 99; *Smith v. Chester*, 1 T. R. 654. Hence the executors were clearly entitled to recover the bonds in the principal case, as an altered form of the *res*. *Graves v. American Exchange Bank*, 17 N. Y. 205; *Hutton v. Holmes*, 97 Cal. 208, 31 Pac. 1131. Furthermore, the obligor may ordinarily recover a payment made to a holder under a forged indorsement. *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *United States v. National Park Bank*, 6 Fed. 852. See AMES, "Doctrine of Price v. Neal," 4 HARV. L. REV. 297, 307. Cf. *London & River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7. *A fortiori*, the obligor in the principal case could not be held liable to the purchaser, in spite of the legal title given to the purchaser by the reissue, unless in some way estopped to deny the forgery of the indorsement. It is true that negligence in signing commercial paper under the belief that it is an instrument of a different nature, estops the signer from denying liability on the instrument. *Douglass v. Matting*, 29 Ia. 498; *Chapman v. Rose*, 56 N. Y. 137; *Winchell v. Crider*, 29 Oh. St. 480. By analogy, the negligent reissue of an instrument under a forged indorsement should estop the issuer from denying the title of a subsequent *bonâ fide* purchaser of the new instrument. But in the principal case, the payee's indorsement on the new instrument was also forged, and since there was no negligence in the second reissue, the purchaser cannot recover unless the negligence of the obligor in the first reissue estops him from asserting the subsequent forged indorsement. To utter commercial paper in an improper form

which invites alteration, would estop the obligor from setting up any such forgery. *Harvey v. Smith*, 55 Ill. 224; *Garrard v. Haddan*, 67 Pa. St. 82; *Young v. Grote*, 4 Bing. 253. Cf. *Knoxville National Bank v. Clark*, 51 Ia. 264, 1 N. W. 491; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; *contra*, *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559. But if an instrument is properly drawn there is no duty of care to see that it does not get into the hands of a forger. *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. C. P. 713; *Baxendale v. Bennett*, 3 Q. B. D. 525. See *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 528, 51 N. E. 9, 14; *Bank of Ireland v. Trustees of Evans Charities*, 5 H. L. C. 389; *Arnold v. Cheque Bank*, 1 C. P. D. 578, 588. Accordingly there was no basis for an estoppel as to the second forgery, and the principal case seems wrong in allowing the purchaser to demand reimbursement from the obligor.

CARRIERS — PASSENGERS: PERSONAL INJURIES TO PASSENGERS — RIGHT TO RECOVER FOR INSULTS OF A SERVANT ALTHOUGH SUBJECT TO EJECTION. — In a case of connecting carriage, the conductor of the first carrier received, without objection, the ticket of the plaintiff which entitled her to transportation in the reverse direction from that of the journey undertaken. She was given no voucher for this ticket and was subjected to insult from the conductor of the defendant, the second carrier, when she was unable to produce a voucher. *Held*, that the plaintiff cannot recover. *Robinson v. New York, N. H. & H. R. Co.*, 150 N. Y. Supp. 925 (App. Div.).

The court based its decision on the ground that the plaintiff had no valid contract of carriage and was therefore not entitled to any reparation for the injuries suffered. For a discussion of the proper theory underlying the law of public callings, see NOTES, p. 620.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATE REGULATION OF SALE OF STOCKS, BONDS AND OTHER SECURITIES. — An Arkansas statute required that before attempting to sell any securities, foreign and domestic investment companies, which were defined to include individuals and associations of individuals, should file full data regarding their plan of business, and financial condition, and certain reports, with the insurance commissioner, who was authorized to prohibit the business if in his judgment a company was not solvent, or was not maintaining a fair, just, and equitable plan of business, or did not promise a fair return. LAWS, 1913, p. 904. A foreign company engaged in selling investment home-purchasing contracts on an instalment plan and in making loans on the same, seeks to enjoin the enforcement of the statute. *Held*, that the statute is constitutional. *Standard Home Co. v. Davis*, 217 Fed. 904 (D. C., E. D. Ark.).

An individual who received stock in a mining corporation in return for property conveyed, and later sold the stock in violation of a West Virginia statute of similar purport, LAWS, 1913, c. 15, now seeks to enjoin criminal proceedings against him, on the ground that the statute is unconstitutional. *Held*, that the statute is unconstitutional. *Bracey v. Darst*, 218 Fed. 482 (D. C., N. D. W. Va.).

These cases have brought before the courts the "Blue Sky Laws" of two more states. In the Arkansas case, the problem of the constitutionality of state regulation of the sale of stocks and bonds was not squarely presented. The company in question was engaged rather in the loan and investment business than in the sale of securities, but the court said broadly that the statute had such a reasonable relation to the public welfare that it would be sustained as an exercise of the police power. No objection, furthermore, could be made to the regulation as an interference with interstate commerce, for the business, while interstate, closely resembled insurance and was not commerce. *Cf. New*

York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495. In the West Virginia case, the court carefully distinguishes the statute involved from the Florida law which was recently upheld, on the ground that that statute was merely a regulation of corporate business, and did not apply to individuals. *Ex parte Taylor*, 66 So. 292. In its application to individuals, the court held the statute bad as a deprivation of property without due process of law, a denial of the equal protection of the laws, and as an interference with interstate commerce. This view accords with the Iowa and Michigan decisions. *William R. Compton Co. v. Allen*, 216 Fed. 537; *Alabama & New Orleans Transportation Co. v. Doyle*, 210 Fed. 173. For a discussion of the principles involved in these cases, see 27 HARV. L. REV. 741.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — WAREHOUSE RECEIPT MADE CONCLUSIVE EVIDENCE. — A statute declared that a warehouseman should not be permitted to deny that the person to whom a warehouse receipt was issued was the owner of the grain represented by the receipt, and that possession of the receipt should be conclusive evidence of such ownership as far as the duties of the bailee were concerned. SO. DAK. LAWS, 1903, c. 8. The defendant warehouseman pleads voluntary delivery to the true owner as a defense to an action by the holder of a warehouse receipt. At a previous hearing the court held that nothing but a surrender under legal process would be a defense under the statute. *Held*, that the statute, as construed, is constitutional. *Street v. Farmers' Elevator Co.*, 149 N. W. 429 (S. D.).

It is clear that the legislature may regulate the rules of evidence, and that this statute could not possibly be unconstitutional as an interference with the functions of the judiciary. Thus statutes declaring tax deeds *prima facie* evidence of the validity of the sale are universally upheld. *Marx v. Hanthorn*, 148 U. S. 172. It is equally clear that any change in the substantive law, whether labelled a rule of evidence or not, will be unconstitutional if it has the effect of taking property without due process of law. So a statute which, by making an independent fact conclusive evidence against a party, deprives him of the opportunity of having his rights determined in a court of law, is unconstitutional. *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513; *McCready v. Sexton*, 29 Ia. 356. See *Cairo & Fulton R. Co. v. Parks*, 32 Ark. 131, 145. But a statute which merely makes a deliberate contract act of a party operate as an estoppel against him, appears to be unimpeachable. *Orient Insurance Co. v. Daggs*, 172 U. S. 557; *Yazoo & M. V. R. Co. v. G. W. Bent & Co.*, 94 Miss. 681, 47 So. 805; *Peever Mercantile Co. v. State Mutual Fire Insurance Co.*, 25 S. D. 406, 127 N. W. 559. This seems to be the real nature of the statute in the principal case. As construed by the court it does not permit the warehouseman to defend by proving voluntary delivery to the true owner, but it still involves no real danger that the warehouseman will be deprived of his property without due process of law. *Street v. Farmers' Elevator Co.*, 33 S. D. 601, 146 N. W. 1077. It was, therefore, properly held constitutional. But see *Missouri, K. & T. Ry. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653; 16 HARV. L. REV. 141.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — CONTRACT BY STATE NOT TO EXERCISE THE RATE-MAKING POWER. — In pursuance of its statutory right to fix its own passenger and freight rates, a railroad contracted with the defendant to freight lumber at a special rate, so long as the defendant operated a certain mill. Subsequently, the Railroad Commission Act made it unlawful for any railroad to charge a greater or less rate than that required to be filed. The plaintiff thereupon filed a reasonable tariff, in excess of the contract rate. The plaintiff now sues to recover the filed tariff charges. *Held*, that the plaintiff may recover. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Menasha W. W. Co.*, 150 N. W. 411 (Wis.).

A state cannot divest itself of those powers which it was created to exercise. See *Stone v. Mississippi*, 101 U. S. 814, 819. Hence any attempt to bargain away its governmental powers is futile, and not within the protection of the contract clause. *Newton v. Commissioners*, 100 U. S. 548; *Stone v. Mississippi*, *supra*. The rate-making power, whether it be regarded as within the broad scope of the police power, or as inherent in the power to regulate all business affected with a public interest, seems essentially governmental. See *Munn v. Illinois*, 94 U. S. 113, 125; *Railroad Commission Cases*, 116 U. S. 307, 325, 330; cf. 23 HARV. L. REV. 388. Accordingly, there is a strong presumption that no attempt to contract it away has been made. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434; *Matthews v. Board of Corporation Commissioners*, 97 Fed. 400. Thus the legislation in the principal case was construed as an authority to the railroad to fix its own rates, revocable at the pleasure of the state. Hence the defendant's contract was subject to this reserved power of revocation. *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467. A similar case, where the state had delegated to a municipality merely the power to grant such authority to a street railway, must be distinguished on the ground that an attempted revocation by the municipality exceeded the powers delegated to it by the state. *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368. A more difficult problem arises where there has been a deliberate attempt by the state to bargain away the rate-making power. But so long as this power is regarded as governmental any such contract should be deemed ineffective, in spite of the contract clause, to prevent subsequent rate legislation. *Laurel Fork R. Co. v. Transportation Co.*, 25 W. Va. 324; *contra*, *Pingree v. Michigan Cent. R. Co.*, 118 Mich. 314, 76 N. W. 635.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT — STATUTE RESTRICTING EMPLOYMENT OF ALIENS. — A statute required municipal corporations to employ on public works only United States citizens. NEW YORK LABOR LAW, Art. 2, § 14; LAWS OF 1909, c. 36. *Held*, that the statute is not a deprivation of rights to which aliens are entitled under the Fourteenth Amendment. *People v. Crane*, 52 N. Y. L. J. 2133, 2151. (N. Y. Ct. of App.).

For a criticism of the opposite result in the court below, see 28 HARV. L. REV. 498.

CONSTITUTIONAL LAW — POWERS OF THE EXECUTIVE — DELEGATION OF LEGISLATIVE POWER TO THE EXECUTIVE: IMPLIED AUTHORITY TO WITHDRAW PUBLIC LANDS FROM ENTRY. — Public lands which Congress had opened to occupation and settlement (ACT OF FEB. 11, 1897; 29 STAT. 526; R. S. 2319, 2329) were withdrawn from entry by an executive order of the President, without express authority from Congress. *Held*, that the withdrawal was in pursuance of an authority which could be implied from the long acquiescence of Congress. *United States v. Midwest Oil Co.*, U. S. Sup. Ct. Off., No. 278 (Feb. 23, 1915).

For a discussion of this case, see NOTES, p. 613.

CONSTRUCTIVE TRUSTS — LIABILITY OF INNOCENT PARTIES — ATTEMPTED RESERVATION OF EASEMENTS IN GRANT OF DOMINANT TENEMENT. — A grantor conveyed premises abutting on a street over which an elevated railroad had been built. The deed was recorded and expressly reserved the easement in the highway, and all present and future causes of action on account of the construction and continuance of the elevated structure. The grantee conveyed to a sub-grantee, and the grantor's executrix now joins the elevated company and the sub-grantee in a suit in equity to recover damages for the

invasion of the easement. *Held*, that recovery will be allowed. *Drucker v. Manhattan Ry. Co.*, 213 N. Y. 543.

The plaintiff is clearly entitled to damages accruing before the conveyance, and in somewhat over half the American jurisdictions, where the whole cause of action accrues at once upon the erection of a permanent structure, this would dispose of the case. *Powers v. St. Louis, I. M. & S. Ry. Co.*, 158 Mo. 87, 57 S. W. 1090; *Kankakee & Seneca R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621. *Contra*, *Hoffman v. Flint & P. M. R. Co.*, 114 Mich. 316, 72 N. W. 167. See 2 LEWIS, EMINENT DOMAIN, §§ 937, 944. In New York, however, a difficulty arises as to subsequent damages, for that jurisdiction regards the injury as continuing and awards complete damages only in lieu of a permanent injunction. *Galway v. Metropolitan Elevated Ry. Co.*, 128 N. Y. 132, 28 N. E. 479; *Pond v. Metropolitan Elevated Ry. Co.*, 112 N. Y. 186, 19 N. E. 487. It is clear that the easements themselves could not exist apart from the dominant tenement, and hence could not effectively be reserved at law. *Shepard v. Manhattan Ry. Co.*, 169 N. Y. 160, 62 N. E. 151; *Pegram v. New York Elevated R. Co.*, 147 N. Y. 135, 41 N. E. 424. But the intent of the reservation was fulfilled by construing it as a covenant by the grantee to hold his claims for damages in trust for the grantor as they accrued. Regarded merely as a covenant, it would be anomalous for it to run with the land, for with a few recognized exceptions the burden of affirmative covenants does not run even in equity. *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114; *Reid v. McCrum*, 91 N. Y. 412. See *Kidder v. Port Henry, etc. Co.*, 201 N. Y. 445, 94 N. E. 1070. But *cf. Monroe v. Syracuse, L. S. & N. R. R. Co.*, 200 N. Y. 224, 93 N. E. 516. But since the deed showed that the beneficial interest in the easements was not intended to pass, it would be against conscience for the grantee with notice to retain what in substance belonged to the original grantor. Accordingly, equity held him as constructive trustee. See 20 HARV. L. REV. 496. The sub-grantee's position in fact closely resembles that of a conduit of title man, upon whom a trust is imposed if he refuses to convey. *Ryan v. Ford*, 151 Mo. App. 689, 132 S. W. 610. The principal case is in accord with an earlier New York decision which allowed recovery from a sub-grantee after he had received damages from the railroad. *Western Union Telegraph Co. v. Shepard*, 169 N. Y. 170, 62 N. E. 154. See also *Pegram v. New York Elevated R. Co.*, 147 N. Y. 135, 147, 41 N. E. 424, 429; *Schomacker v. Michaels*, 189 N. Y. 61, 81 N. E. 555.

CORPORATIONS — CITIZENSHIP AND DOMICILE OF CORPORATION — ENEMY CHARACTER: DOMESTIC CORPORATION COMPOSED OF ALIEN ENEMIES. — All but two of the twenty-five thousand shares of stock of a corporation incorporated in England were held by Germans. The corporation now brings suit against the defendants in an English court. *Held*, that it is entitled to maintain the action. *Continental Tyre & Rubber Co., Ltd. v. Daunler Co., Ltd.*, 138 L. T. J. 272 (C. A.).

The court refused to disregard the corporate fiction and held that the enemy character of the shareholders did not alter the character of the corporation. The decision is undoubtedly correct. It shows a proper respect for the separate corporate existence and at the same time involves no danger of aiding the enemy, for it expressly forbids remitting any of the proceeds of the suit to the enemy shareholders. For a discussion of the principles involved, see 15 HARV. L. REV. 60, 236; 28 *id.* 335.

CRIMINAL LAW — STATUTORY OFFENCES — WHITE SLAVE TRAFFIC ACT: LIABILITY OF THE WOMAN FOR CONSPIRACY. — The defendant, a woman, was indicted for conspiring to have herself transported in interstate commerce for purposes of prostitution, in violation of the White Slave Traffic Act. 4 U. S. COMP. STAT., 1913, § 8813. *Held*, that the indictment is valid. *Dictum*, that

the woman could be guilty of the substantive offence as well as of the conspiracy. *United States v. Holte*, 236 U. S. 140.

It is a rule based on sound public policy that the victim of conduct which the law has made criminal for the victim's own protection, cannot be indicted for coöperating with the perpetrator. See 24 HARV. L. REV. 61; and see *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 495, 95 N. E. 876, 878. To take the case out of the scope of this doctrine, the court relies on decisions in three jurisdictions that a woman can be indicted for conspiring to have another commit the crime of abortion on her. *Queen v. Whitchurch*, 24 Q. B. D. 420; *Solander v. People*, 2 Colo. 48; *State v. Crofford*, 133 Ia. 478, 110 N. W. 921. The English case represents a jurisdiction in which the woman can be indicted as accessory to the crime, on the theory that the statute makes abortion a crime to protect the unborn child as well as the mother. *King v. Sockett*, 1 Cr. App. R. 101. And see *Regina v. Cramp*, 14 Cox C. C. 390. The two American cases, however, assume the prevalent view that she cannot be indicted as accessory, but consider that the rule does not apply to the conspiracy. *Dunn v. People*, 29 N. Y. 523; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471. The distinction seems unsound, for the grounds of policy which absolve the woman from liability for the substantive crime apply as strongly to an attempt, solicitation or conspiracy to commit the crime. Both decision and *dictum* in the principal case seem inconsistent with the primary purpose of the statute, which was to protect women from commercialized prostitution through the instrumentalities of interstate commerce. See *Hoke v. United States*, 227 U. S. 308, 322. And see Report of House Committee, H. R. 47, SIXTY-FIRST CONG., 2ND SESS., pp. 10, 11. "That the woman always is the victim" may well be an illusion, as is suggested by Mr. Justice Holmes, for the court; yet she was undoubtedly so regarded by Congress, as the very name of the statute suggests; and even Congressional illusions, while they should not be encouraged, should at least be respected by the judiciary.

DECEIT — PARTICULAR CASES — TRADE UNION'S FAILURE TO NOTIFY OF CHANGE IN WAGE SCALE. — A certain labor union had absolute control over the labor of bricklayers, and fixed the wage to be charged for their services at the beginning of each calendar year. According to custom, in the early part of 1910, the union informed the plaintiff, a contractor, of the rate for that year, but shortly thereafter lowered the rate without giving notice to the plaintiff. In ignorance of the change the contractor continued for several months to pay the higher wage, and he now seeks to recover the loss from the union. *Held*, that he can recover. *Powers v. Journeymen Bricklayer's Union*, 172 S. W. 284 (Tenn.).

It seems impossible to gather from the facts any contract between the labor union and the contractor. Any recovery, therefore, must be in tort for deceit. No action for deceit, however, can be based on a representation that involves nothing but a promise or expression of intention, unless the defendant at the very time intended not to carry it out. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; cf. *Long v. Woodman*, 58 Me. 49. And it is generally said that mere silence will not be ground for an action of deceit. See *Arkwright v. Newbold*, 17 Ch. D. 301, 318. But under certain circumstances, in view of the relation of the parties, there may be a duty to speak, and then silence will amount to a representation. See *Mason v. Banman*, 62 Ill. 76. Moreover, when a man makes a representation true at the time, but which subsequent facts, arising before it is acted upon, render false to the knowledge of the maker, non-disclosure of these facts is ground for avoidance of a contract based upon the original representation. *Traill v. Baring*, 4 DeG. J. & S. 318; *Janes v. Trustees of Mercer University*, 17 Ga. 515; *Lancaster County Bank v. Albright*, 21 Pa. 228. An action for deceit should lie under the same circumstances. *Loewer v. Harris*,

57 Fed. 368; see *Brownlie v. Campbell*, 5 A. C. 925, 950. See SALMOND, TORTS, 3 ed., p. 448. In the principal case a corresponding duty to speak seems to arise by reason of the relation between the parties and the complete dependence of the contractor upon the representations of the union. It follows that the union's statement constituted a continuing representation which upon the lowering of the wage scale without notice to the plaintiff became a positive misrepresentation.

DEEDS — CONSTRUCTION AND OPERATION IN GENERAL — CONVEYANCE BY GRANTOR TO HIMSELF AND WIFE. — The grantor conveyed land to himself and wife "jointly, the survivor to have full ownership." The grantor died, and after the death of the wife, his heirs claim the land. *Held*, that they are entitled to one-half. *Wright v. Knapp*, 150 N. W. 315 (Mich.).

The decision takes the ground that the conveyance created a tenancy in common. According to very old authority a deed made to one incapable of taking and to others that are capable, inures only to the benefit of those capable. SHEP. TOUCH. 82; *Humphrey v. Tayleur*, 1 Amb. 136. To the same effect are *Ball v. Deas*, 2 Strob. Eq. (S. C.) 24; *McCord v. Bright*, 44 Ind. App. 275, 87 N. E. 654. Therefore, if a man, intending to create a joint tenancy, conveys land to himself and others, a joint estate in the whole is created in the others, since he cannot convey to himself. *Cameron v. Steves*, 4 Allen (New Bruns.) 141. See 21 HARV. L. REV. 57. But see *Colson v. Baker*, 42 N. Y. Misc. 407, 87 N. Y. Supp. 238; *Saxon v. Saxon*, 46 N. Y. Misc. 202, 93 N. Y. Supp. 191. If the intention was to create a tenancy in common, however, the other grantees would get the property subject to the grantor's intended share, which would remain in him. *Green v. Cannady*, 77 S. C. 193, 57 S. E. 832. But there seems to be no basis for reaching such a result in the principal case. It is true that in spite of the common law's original bias in favor of joint tenancies, the courts from comparatively early times exercised every ingenuity to construe deeds as creating estates in common whenever possible. *Galbraith v. Galbraith*, 3 S. & R. (Pa.) 392. *Cf. Seitz v. Seitz*, 11 App. D. C. 358, 370. This tendency, moreover, has been embodied in statutes in many jurisdictions. See N. Y. CONSOL. LAWS, REAL PROPERTY LAW, § 66; HOW. MICH. STAT., § 10666. But the courts refuse to violate the express intention of the parties to the contrary. *Cover v. James*, 217 Ill. 309, 75 N. E. 490. And in Michigan the statutory provision for construction as a tenancy in common does not apply to a grant to husband and wife. HOW. MICH. STAT., § 10667. It appears to be equally impossible to support the case on a mere conjecture that the construction approximates more nearly to the grantor's intent since it was impossible for a tenancy by the entireties to be created, and the grantor did not intend to divest himself of all the property.

DOWER — INJUNCTION AGAINST WASTE TO PROTECT INCHOATE RIGHT OF DOWER. — A deserted wife brought a bill in equity to enjoin the opening and operating of oil wells by the defendant on land which he had obtained from her husband by a deed in which she did not join. *Held*, that the relief will not be given. *Rumsey v. Sullivan*, 150 N. Y. Supp. 287 (App. Div.).

For a discussion of the principles involved in the decision, see NOTES, p. 615.

EMINENT DOMAIN — COMPENSATION — TAKING OF PRIVATE WAY FOR PUBLIC STREET. — The owner of a tract of land sold all the lots, with private easements in plotted streets, but retained the fee in the streets himself. The city later condemned the fee in the streets and awarded compensation, which the abutters now claim to share on account of their private easements. *Held*, that they are not entitled to the award. *In re Hamburger*, 150 N. Y. Supp. 771 (App. Div.).

Where the abutting owners own the fee, they are entitled to substantial damages for its taking for street purposes, even though private easements already exist in favor of others. *City of Buffalo v. Pratt*, 131 N. Y. 293, 30 N. E. 233; *In re Ninety-Fourth Street*, 22 N. Y. Misc. 32, 49 N. Y. Supp. 600. But it is generally held that a grantor who has retained the bare fee in the plotted streets can get only nominal damages when it is taken. *Matter of the City of New York*, 196 N. Y. 286, 89 N. E. 829; see *Gamble v. Philadelphia*, 162 Pa. St. 413, 29 Atl. 739. Abutting owners with nothing but private easements, as in the principal case, are also unable to recover substantial compensation in the ordinary case where a public highway is substituted for the plotted streets. *Clayton v. Gilmer County Court*, 58 W. Va. 253, 52 S. E. 103. *Matter of the City of New York*, *supra*. Usually, the private easement is not even destroyed, but continues to exist independently of the public right and will revive on the abandonment of the highway. See *Ross v. Thompson*, 78 Ind. 90, 93. Cf. *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. 1047. And in any event, it is difficult to prove damage, for the abutter receives the distinct advantage of a public street, whose maintenance devolves upon the city. It is conceivable, however, that the private enjoyment may be such that it will be impaired by the enlarged public user, and in such cases, the damages in fact sustained should be recoverable. See *Lowery v. City of Pekin*, 186 Ill. 387, 57 N. E. 1062.

EVIDENCE — CONFESSIONS — INVOLUNTARY CONFESSION OF ONE CRIME INADMISSIBLE AT TRIAL FOR ANOTHER — *RES JUDICATA*. — The defendant was on trial for perjury alleged to have been committed by him in denying the criminal act at a former trial for rape. The state offered in evidence a confession made when under arrest for rape, which was not in writing, or preceded by warning, and so failed to comply with the requirements of the statute. TEX. CODE CRIM. PROC., § 790. The defendant objected, and also set up his acquittal at the former trial. Held, that the confession is inadmissible. *Seemle*, that the acquittal was no bar to the prosecution for perjury. *Murff v. State*, 172 S. W. 238 (Tex. Cr. App.).

According to the court's interpretation of the statute, an involuntary confession is made inadmissible for all purposes. This conclusion is in harmony with the reason of the confession rule and the authorities indicate that the same result would be reached even at common law. Thus an involuntary confession by the defendant has been held inadmissible to impeach him as a witness at his trial for the very crime. *Jones v. State*, 149 N. W. 327 (Neb.). See 28 HARV. L. REV. 428. At the trial of another person for the same crime, it is true, a prior involuntary confession by a witness has been considered competent to impeach him. See *State v. Mills*, 91 N. C. 581. But a confession by the defendant himself of a crime other than that for which he is on trial has been held admissible to prove his guilt only on proof that it was voluntary. *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520; cf. *State v. Jones*, 171 Mo. 401, 71 S. W. 680. It would seem that the confession in the principal case would likewise be inadmissible, although it could not be condemned directly as an involuntary confession of the perjury later committed. Whether or not the prior acquittal of the substantive crime would conclude the question of perjury, would depend on the precise issue at the other trial. In substance, the rules with respect to *res judicata* are the same in criminal as in civil causes. See *Coffey v. United States*, 116 U. S. 436. VAN FLEET, FORMER ADJUDICATION, § 594. Thus an acquittal of another crime has been held to bar a subsequent prosecution for perjury where the court found that the parties, the point in issue, and the *quantum* of proof required were the same. *United States v. Butler*, 38 Fed. 498; *Cooper v. Commonwealth*, 106 Ky. 909, 51 S. W. 789. In the principal case, therefore, it seems that the defendant should be able to stand upon the other acquittal only if the perjury

charged was the denial of the criminal act, and collateral questions, such as the victim's age, had not been in issue. To bar the later prosecution for perjury involves the danger that an acquittal obtained by perjured denials will absolve the defendant from the perjury as well, and this possibility demands a strict administration of the rule.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — MATTERS LIKELY TO MISLEAD JURY: PRIVATE RULES TO SHOW STANDARD OF CARE. — In an action for negligent injury by a street car the plaintiff offered the private rules set by the company for its employees as evidence of the proper standard of care. *Held*, that such rules are inadmissible. *Virginia Railway & Power Co. v. Godsey*, 83 S. E. 1072 (Va.).

The private rules of a company are not admissible, unless possibly in connection with similar rules of other companies to show a general practice, except as admissions that conduct in violation of such rules is negligent. As admissions, however, they have but slight force, for ordinarily the rules impose on the employees a standard of care higher than that required by law, since the company is desirous of avoiding not simply liability but also accidents from the negligence of others. Furthermore, the policy against such evidence is strong, for the law should encourage the employer to set a high standard. To allow the rules to be introduced as admissions of the legal standard of care would induce carelessness and would penalize the cautious employer. The evidence of subsequent repairs to prove a previous negligent condition presents a close analogy. Such evidence is now always excluded. *Morse v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 465, 16 N. W. 358; *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202; *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L. T. N. S. 261. A few courts, however, have allowed the admission of private rules. *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Stevens v. Boston Elevated Ry. Co.*, 184 Mass. 476, 69 N. E. 338; *Cincinnati Street Ry. Co. v. Altemeier*, 60 Oh. St. 10, 53 N. E. 300; *Delaware, L. & W. R. Co. v. Ashley*, 67 Fed. 209. The authority of some of these cases is weakened by the unsound reasoning upon which they rest. The Massachusetts court, for example, confuses private rules and municipal ordinances. See 27 HARV. L. REV. 317. And the Ohio court admits the evidence on the illogical ground that the rules are part of the *res gesta*. The better authorities support the view taken in the principal case, which seems much to be preferred. *Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450, 34 So. 917; *Hoffman v. Cedar Rapids & M. C. Ry. Co.*, 157 Ia. 655, 139 N. W. 165; *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — *AD DAMNUM* REDUCED TO PREVENT REMOVAL FROM STATE TO FEDERAL COURT. — The plaintiff was suing in a state court for five thousand dollars, but received notice that the defendant was about to file a petition for removal to the federal court, and reduced his *ad damnum* by amendment to three thousand dollars to prevent the federal court from getting jurisdiction. *Held*, that the federal court has no jurisdiction. *Anderson v. Western Union Tel. Co.*, 218 Fed. 78 (D. C., E. D., Ark.).

A situation somewhat analogous to the principal case arises when a party changes his domicile for the purpose of getting his case into the federal courts. If a new domicile is actually acquired, the motive for the change is immaterial. *Williamson v. Osenton*, 232 U. S. 619. A real transfer of the property in dispute to a citizen of another state will likewise give the diversity of citizenship necessary to federal jurisdiction, whatever be the motive. *Briggs v. French*, 2 Sumner (U. S.) 251. But see FEDERAL JUDICIAL CODE, § 24. Similarly the decisions were unanimous to the effect that a *remittitur* even

after judgment would prevent an appeal from a Circuit to the Supreme Court. *Alabama Gold Life Ins. Co. v. Nichols*, 109 U. S. 232; *Pacific Postal Tel. Cable Co. v. O'Connor*, 128 U. S. 394. When, as in the principal case, there is a reduction of the *ad damnum* clause to prevent removal to the federal court, the same underlying principle governs. The reduction, if it takes place after removal, will, of course, be ineffectual to deprive the federal court of jurisdiction already acquired. *Johnson v. Computing Scale Co.*, 139 Fed. 339. The same is true if the petition and bond for removal have already been filed. *Chicago, R. I. & P. R. Co. v. Stone*, 70 Kan. 708, 79 Pac. 655. But a reduction made prior to the filing of the petition for removal is effective to prevent the federal court from getting jurisdiction. *Western Union Tel. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 312.

FOREIGN CORPORATIONS — DOMESTIC JURISDICTION — JURISDICTION OF EQUITY TO INTERFERE WITH INTERNAL MANAGEMENT OF FOREIGN CORPORATION. — A foreign mutual beneficiary society threatened to cancel the plaintiff's certificate entitling him to membership and insurance. Having served process on the local agent, the plaintiff asks an injunction to prevent this action by the corporation. *Held*, that the relief cannot be granted. *Tolbert v. Modern Woodmen of America*, 145 Pac. 183 (Wash.).

For a discussion of the jurisdiction of equity over the internal management of foreign corporations, see p. 611 of this issue of the REVIEW.

INJUNCTIONS — ACTS RESTRAINED — PAYMENT OF SALARIES ALLEGED NOT TO BE CONSTITUTIONALLY AUTHORIZED. — A state legislature created an investigating commission and provided for the payment of the salaries and expenses of its members. The plaintiff, a taxpayer, alleging that this legislative action was unconstitutional, brings suit to enjoin the state auditor and treasurer from making the authorized payments. *Held*, that he cannot maintain the suit. *Sutton v. Buie*, 66 So. 956 (La.).

The court, while admitting that these taxpayer's actions are maintainable against municipal officers, properly distinguishes attempts to enjoin state officials by reason of the practical inconvenience involved, and avoids the common error of denying relief upon jurisdictional grounds, or upon the theory that the suit is really brought against the state itself. For a discussion of the principles involved, see 28 HARV. L. REV. 309.

INTERSTATE AND FOREIGN COMMERCE — WHAT CONSTITUTES FOREIGN COMMERCE — ROUTE OVER HIGH SEAS WITH *TERMINI* WITHIN ONE STATE. — A California corporation operated a line of steamships running from one port in California to another port in the same state, part of the voyage being on the high seas. The state Railroad Commission undertook to regulate the rates charged. *Held*, that the state commission has this power. *Wilmington Transportation Co. v. Railroad Commission of California*, 236 U. S. 151.

This case, one of first impression in the United States Supreme Court, affirms the decision of the state supreme court discussed in 27 HARV. L. REV. 686. See *Wilmington Transportation Co. v. Railroad Commission of California*, 166 Cal. 741, 137 Pac. 1153. The only other adjudication is now overruled. *Pacific Coast S. S. Co. v. Board of R. Commissioners*, 18 Fed. 10. The case does not, however, involve a decision that rates for such commerce are exclusively within the control of the states. The court reaches its result on the narrower ground that the matter is one of purely local concern, and therefore within the control of the states, at least until Congress has acted. See *Port Richmond, etc. Co. v. Board of Chosen Freeholders*, 234 U. S. 317. Whether or not such commerce may be brought within federal jurisdiction under the commerce clause remains as yet undecided. The carriage of goods from a point on the high seas without the United States to a point within, although not strictly com-

merce with any foreign nation, has been held within the regulative power of Congress. *The Abby Dodge*, 223 U. S. 166. The same is true of the carriage of goods between two points in the same state over a route passing through another state. *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617. These cases seem to afford strong argument from authority for recognizing a dormant federal power in a situation like the one here disclosed.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — ACT TO REGULATE COMMERCE — ISSUANCE OF PASSES TO EMPLOYEES OF COMMON CARRIERS NOT SUBJECT TO THE ACT. — Section 1 of the Act to Regulate Commerce, as amended June 29, 1906, prohibits the issuance of passes by common carriers subject to the Act, but expressly permits "the interchange of passes for the officers, agents and employees of common carriers and their families." This section was reenacted in 1910, with an amendment providing that the section should not prohibit "the privilege of passes . . . for . . . employees . . . of such telegraph, telephone, and cable lines, and the . . . employees . . . of other common carriers subject to the provisions of this act." The United States seeks to enjoin the issuance of passes by the defendant to employees of common carriers not subject to the Act. *Held*, that the relief be denied. *United States v. Erie R. Co.*, Sup. Ct. Off., No. 493 (Feb. 23, 1915).

The section in question had been previously interpreted by the Interstate Commerce Commission to mean that the interchange of passes was not permissible except with carriers subject to the Act. *Petition of the Frank Parmelee Co.*, 12 I. C. C. 39. And this interpretation had been embodied in the Conference Rulings. *I. C. C. Conference Rulings*, 95 g. In 1910 the section was reenacted without change, except for the addition of the second proviso above quoted. 36 U. S. STAT. AT LARGE, 546. Such a reenactment indicates a certain tacit approval of the Commission's interpretation and might have been expected to influence the Supreme Court to adopt the existing construction. See *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401. But the actual, and unopposed, practice of the carriers was to the contrary, and accordingly the court was persuaded to adopt a construction opposed to the Commission's ruling. The amendment of 1910 was taken to sustain the view of the court, in that it limited the interchange merely of telegraph and telephone franks to carriers subject to the Act. Furthermore, the only possible justification for the interchange of passes even with employees of carriers subject to the Act arises from the financial value of harmonious relations with possible feeders, and applies with equal cogency in the case of carriers not subject to the Act. The Supreme Court's construction, therefore, leaving aside any question of the possible abuse of such a pass system, seems to be completely in harmony with the logic of the exemption.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — APPLICATION OF CARMACK AMENDMENT TO SHIPMENTS BETWEEN TWO TERMINI IN SAME STATE WHICH PASS THROUGH ANOTHER STATE. — A shipment of goods from one point to another in the same state passed *en route* through another state. The shipper now seeks to hold the initial carrier for damages without showing a contract for through carriage. The Carmack Amendment provides for the liability of the initial carrier in shipments "from a point in one state to a point in another state." *Held*, that the plaintiff cannot recover. *Wichita Falls & W. Ry. Co. of Texas v. Asher*, 171 S. W. 1114 (Tex. Civ. App.).

The court takes the position that the Carmack Amendment does not apply to a shipment of this nature. Such a shipment is undoubtedly interstate, and therefore subject to regulation by Congress. *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617. The inquiry then is merely whether Congress has in

fact taken control of commerce between points in the same state passing through another state. Authority is abundant to the effect that the provisions of the Act as to rates apply to such commerce. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 162 Fed. 835; *Milk Producers' Ass'n v. Delaware, L. & W. R. Co.*, 7 I. C. C. 92. These cases rely on the words of § 1, defining the scope of the Act, "from one State . . . to any other State, . . . provided that the provisions of this Act shall not apply to transportation . . . wholly within one State." The language of the Carmack Amendment is as broad and should not be construed to have a less comprehensive scope. The narrow interpretation adopted in the principal case defeats the uniformity which Congress presumably sought to secure, and it is submitted that it would be much preferable to construe the Amendment broadly to cover this as well as other kinds of interstate commerce.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — POWER TO INSPECT CORRESPONDENCE OF CARRIERS. — While engaged, in response to a resolution of the Senate, in investigating alleged financial and political practices of the defendant railroad, the Interstate Commerce Commission requested the railroad to give the examiners access to its correspondence files. The defendant refused. *Held*, that there was no error in refusing a mandamus to compel the railroad to give such access. *United States v. Louisville & Nashville R. Co.*, Sup. Ct. Off., No. 499 (Feb. 23, 1915).

As an investigating body the Interstate Commerce Commission has broad and not very well-defined powers and duties. Under Section 12 of the Interstate Commerce Act, it may, by compelling attendance of witnesses and production of books and papers, call for such information as it needs to carry out the purposes for which it was created. 4 U. S. COMP. STAT. 1913, § 8576. This section gives merely a judicial power to call for papers by subpoena, not a power to inspect them through examiners; and constitutional doubts have led the Supreme Court to hold that the inquisitorial power may be used only in aid of the quasi-judicial functions of the Commission. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407. Section 20 of the Act empowers the Commission to prescribe the forms of accounting and traffic records, and gives its agents access to the "accounts, records and memoranda" of the carriers. 4 U. S. COMP. STAT. 1913, § 8592 (5). As to records of an accounting nature, this section has been given the broadest possible construction. See *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194. It seems clear, however, that it was intended to apply only to traffic and accounting records, and not to correspondence files; it was certainly so understood by the Commission, which itself drafted and recommended the provision. See 19th ANNUAL REPORT, I. C. C., pp. 11, 182. There was nothing in the Act, therefore, to justify the roving commission sought in the principal case. See also *United States v. Nashville, C. & St. L. Ry.*, 217 Fed. 254.

JOINT-WRONGDOERS — INDEMNITY: PARTIES NOT *IN PARI DELICTO*. — A colt was injured by a strand of barbed wire which was permitted to trail into the highway by reason of the negligence of both the township and the owner of the adjacent land. The township, having been compelled to pay a judgment for damages to the owner of the colt, brings an action over against the landowner. *Held*, that it may recover. *College Township v. Fishburn*, 72 Leg. Intell. 34 (Dist. Ct., Pa.).

The decision assumes the doctrine not generally accepted elsewhere that a mere township is under the same liability as a municipality for negligent maintenance of a highway. On this basis, it permits the township, in accordance with the usual rule, to recover over against the person who negligently created or continued the dangerous condition which caused the damage for which it

had to answer. *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316; *Inhabitants of Westfield v. Mayo*, 122 Mass. 100; *City of Astoria v. Astoria & C. R. Co.*, 67 Ore. 538, 136 Pac. 645; see 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., §§ 1727-1730; BISHOP, NON-CONTRACT LAW, § 535. In situations of this character, although the negligent parties may be jointly liable to third persons, as between themselves they are not *in pari delicto*, for one merely stands sponsor for the exercise of due care by the other, and the one subject to the primary duty incurs the ultimate liability. *Gray v. Boston Gaslight Co.*, 114 Mass. 149; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 144 N. Y. 663, 39 N. E. 360; *Central of Georgia R. Co. v. Macon Ry. & Light Co.*, 140 Ga. 309, 78 S. E. 931. Despite the concurring breach of duty, the principles of contributory negligence do not apply, for the right to indemnity is determined, not by comparing the efficiency of the negligence of each in causing the resulting loss, but by ascertaining the duties of the wrongdoers *inter se*. See 21 HARV. L. REV. 233, 242. But cf. *Nashua Steel and Iron Co. v. Worcester & Nashua R. Co.*, 62 N. H. 159. The result of the principal case is the more easily reached because of the anomalous doctrine of the Pennsylvania courts that the parties here, though equally liable to the outsider, are not chargeable as joint tortfeasors. *Dutton v. Borough of Lansdowne*, 198 Pa. St. 563, 48 Atl. 494. See *Brookville Borough v. Arthurs*, 130 Pa. St. 501, 515, 18 Atl. 1076, 1077; 15 HARV. L. REV. 159.

LIBEL AND SLANDER — DEFENSES — LIBEL OF BUSINESS CONDUCTED IN VIOLATION OF STATUTE. — The plaintiffs were engaged in the milk business, under the name of "The Lambert Dairy Company," in violation of a statute which made it a misdemeanor to conduct business under an assumed name without filing a certificate showing both the fictitious and the actual names of the participants. The defendant accused the dairy company of selling adulterated milk. The plaintiffs bring an action of libel for injury to the business. *Held*, that they cannot recover. *Williams v. New York Herald Co.*, 150 N. Y. Supp. 838 (App. Div.).

The statute in the principal case was probably designed to protect creditors and would not of itself be a defense for ordinary tortfeasors. *Wood v. Erie R. Co.*, 72 N. Y. 196. Hence, if the plaintiffs were suing for injury to their individual reputations, it seems that recovery should be allowed. *Long v. Chubb*, 5 C. & P. 55. This would accord with the general doctrine that a plaintiff's illegal conduct, unless a proximate cause, is no bar to his action. *Sutton v. Wauwatosa*, 29 Wis. 21. See 18 HARV. L. REV. 505; 27 HARV. L. REV. 317, 338. Even where the action is for damage to the plaintiffs in their business, as in the principal case, their illegality would not be a good defense by way of justification. *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381. But the breach of the statute does go to the merits of their right to maintain an action. For it seems impracticable to differentiate between an interference with the profits of an illegal business, and with the profits of an otherwise legal business carried on under an unlawful name. The profits, then, being those of an illegal undertaking, the plaintiffs cannot complain that they have been diminished. The cases which deny recovery to an unlicensed physician when his professional reputation is libelled seem closely analogous. *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432; see *Collins v. Carnegie*, 1 A. & E. 695; *Marsh v. Davison*, 9 Paige (N. Y.) 580. It is possible that recovery might also be denied on the ground that, towards a business illegally conducted, there exists no duty with regard to the use of words. See *Johnson v. Irasburgh*, 47 Vt. 28; 27 HARV. L. REV. 317, 339.

LIFE ESTATES — RECOVERY BY LIFE TENANT FOR INJURY TO THE INHERITANCE: RELATION TO LIABILITY FOR PERMISSIVE WASTE. — The plaintiff, a

tenant for life of land, with remainder to another in fee, sues a stranger for injury to the property caused by the stranger's negligence in allowing the fire to spread. *Held*, that he may recover for the injury both to his interest and to that of the remainderman. *Rogers v. Atlantic, Gulf & Pacific Co.*, 213 N. Y. 246, 107 N. E. 661.

The principal case definitely discards the doctrine of the older cases, which based the life tenant's right to recover for injury to the remainder on the hypothesis that the stranger's negligence rendered the life tenant liable for waste. See *Austin v. Hudson R. R. Co.*, 25 N. Y. 334, 344. Some cases even required actual payment to the remainderman before permitting the particular tenant to recover in full. *Wood v. Griffin*, 46 N. H. 230, 239. Under the old law, this line of reasoning was possible, for a life tenant was punishable for waste committed by a stranger. *Anonymous*, FITZ. ABR., WASTE, pl. 30. See ST. OF GLOUCESTER, 6 EDW. I., c. 5. Under modern English law, however, a tenant for life is not liable for permissive waste. *In re Cartwright*, 41 Ch. D. 532. The same result has been reached in this country as to accidental fires. *Sampson v. Grogan*, 21 R. I. 174, 42 Atl. 712. See 13 HARV. L. REV. 151. And the principal case, in line with the modern tendency, decides that negligent injury by a stranger does not make the life tenant liable for waste. But it nevertheless permits him to recover full damages, by analogy to the rule which allows a bailee to recover against a wrongdoer, even when not liable to the bailor. See *The Winkfield*, [1902] P. 42. The analogy is not perfect, for life tenant and remainderman have such distinct estates that each would be expected to recover simply for the injury to his own interest. *Zimmerman v. Shreeve*, 59 Md. 357; cf. *McIntire v. Westmoreland Coal Co.*, 118 Pa. St. 108. Cf. *Rockwood v. Robinson*, 159 Mass. 406, 34 N. E. 521. In the ordinary case, moreover, it involves no assertion of the *jus tertii* for the wrongdoer to set up that the tenant has only a life estate and should be limited accordingly in his recovery. *Illinois, etc. Coal Co. v. Cobb*, 94 Ill. 55. Procedural convenience, however, affords ample justification for the result of the principal case. It permits the whole controversy to be settled in one action, and at the same time adequately protects the remainderman by imposing a trust in his favor on what the tenant recovers in excess of his own interest.

MASTER AND SERVANT — EMERGENCY DUTY TO SUMMON MEDICAL ASSISTANCE TO INJURED EMPLOYEE. — Plaintiff's intestate, an employee in defendant's stone quarry, was run over by a car which severely crushed and lacerated his leg. The accident occurred without defendant's fault. By reason of the negligent delay of defendant's superintendent in summoning a physician, the employee bled to death. His administrator sues the defendant company. *Held*, that he may recover. *Hunnicke v. Meramec Quarry Co.*, 172 S. W. 43 (Mo.).

For a discussion of this case, see NOTES, p. 607.

NEGLIGENCE — DEFENSES — INJURY SUSTAINED IN SAVING LIFE ENDANGERED BY ANOTHER'S NEGLIGENCE. — The engineer's negligent handling of a train threatened collision with a caboose in which there were several persons. To avoid this, a brakeman stepped in front of the moving train and attempted to apply the emergency air brake. *Held*, that he may recover from the railroad for the injuries sustained. *Haigh v. Grand Trunk Pacific Ry. Co.*, 30 West. L. R. 173 (Alberta).

The plaintiff, noticing a train approaching, tried to remove a small push car which he had wrongfully placed upon defendant's tracks, but was injured by reason of negligence on the part of the engineer after discovery of the plaintiff's danger. *Held*, that the plaintiff may recover. *Great Northern Ry. Co. v. Harman*, 217 Fed. 959 (C. C. A., 9th Circ.).

Where the plaintiff voluntarily risks his own life in order to save the lives of others imperiled by the wrongful conduct of the defendant, his right of action rests upon the ground that such intervention is foreseeable. Consequently the courts recognize a duty running to the plaintiff to avoid causing such peril to the lives of others as to invite humane rescuers to risk their own safety. *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *Dixon v. New York, N. H. & H. Ry. Co.*, 207 Mass. 126, 92 N. E. 1030. See 24 HARV. L. REV. 407. It is generally said, furthermore, that the rescuer's conduct does not necessarily involve contributory negligence and that he will be denied recovery only if he acted so rashly or recklessly that a jury would deem him unreasonable in taking the risk. *Eckert v. Long Island R. Co.*, *supra*; *Pennsylvania Co. v. Langendorff*, 48 Oh. St. 316, 28 N. E. 172. *Contra*, *Anderson v. Northern Ry.*, 25 U. C. C. P. 301. *Cf. Blair v. Grand Rapids L. & D. R. Co.*, 60 Mich. 124, 26 N. W. 855. In the second principal case, the court relied in part upon the doctrine of "last clear chance." This seems erroneous, in view of the rescuer's ability to step back from the tracks at a time when the defendant is no longer able to avoid the accident. See 27 HARV. L. REV. 757. In both cases there may be some question upon the facts whether the plaintiff was trying to save life and not merely attempting to avoid the destruction of property. See *Condiff v. Kansas City, etc. R. Co.*, 45 Kan. 256, 25 Pac. 562. See 24 HARV. L. REV. 406. But on this point the cases show a tendency to allow recovery wherever the plaintiff's conduct can reasonably be explained as an effort to prevent loss of human life.

PAROL EVIDENCE — SUBSTANTIVE LAW EXPRESSED IN TERMS OF EVIDENCE — CONTRACTS: ADDITION OF A TERM IMPLIED BY CUSTOM. — The plaintiff by a written contract licensed the defendant to perform a certain play in the United States and Canada, and brought suit for the royalties accruing under the contract. The defendant offered parol evidence to show a custom in the theatrical business that such licenses were in fact understood to be exclusive. *Held*, that the evidence was properly excluded. *Hart v. Cort*, 151 N. Y. Supp. 4 (App. Div.).

It is a well-established principle that parties to a contract on a subject matter concerning which known usages prevail, are deemed to have incorporated such usages by implication into their agreement, if nothing is said to the contrary. *Brown v. Byrne*, 3 E. & B. 703; *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105; *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844. But in determining what was the understanding of the parties the court is limited by the rule that whatever by the terms of the writing the parties have either expressly or impliedly excluded, cannot be considered a part of the contract, and it requires no rule of evidence to render such matter incompetent. This should be, it is submitted, the criterion in determining the admissibility of custom and usage. See *Webb v. Plummer*, 2 B. & Ald. 746, 750; 4 WIGMORE, EVIDENCE, § 2430. Therefore in the principal case, since it does not appear that the writing purported to dispose of the question raised by the evidence offered, it would seem that the custom should be admissible to enable the court to interpret the meaning of the contract. Upon the whole subject the authorities are somewhat confused, but better reason and the weight of authority seem to support the view of the dissenting judges. See 6 HARV. L. REV. 325, 418.

RULE AGAINST PERPETUITIES — GENERAL AND PARTICULAR INTENT IN CONNECTION WITH RULE. — The testator left family portraits to "the eldest of my sons who may be living at the decease of my wife and myself in trust to preserve and to be transferred at his death to my next eldest son then alive — and so on — through all my sons; and then to the eldest grandson then alive and at his death to the next eldest and so on through all the grandsons." The

plaintiff was alive at the testator's death and was the oldest grandson alive at the death of the first grandson to take. *Held*, that the plaintiff is entitled to the portraits. *Wentworth v. Wentworth*, 92 Atl. 733 (N. H.).

The court seems right in treating the plaintiff's interest as contingent. The gift is not one of a succession of life estates to named descendants, but rather a bequest to him who shall fulfill a certain description at a given moment, and until that moment arrives the person is unascertainable. At common law, therefore, limitations to grandsons other than the first one to take would be too remote, since the estates would not necessarily vest within the period of lives in being and twenty-one years. The court admits this, but says that the New Hampshire rule is to carry out the testator's intent as far as possible and hold the gifts good for the lives in being at the testator's death and twenty-one years thereafter. In an earlier case the same court changed a contingent gift to unborn grandchildren at forty into a gift to them at twenty-one and thus sustained the devise. *Edgerly v. Barker*, 66 N. H. 434, 31 Atl. 900. Professor Gray's criticism of that case makes further censure unnecessary. See 9 HARV. L. REV. 242; GRAY, RULE AGAINST PERPETUITIES, §§ 857-893. The principal case seems to adopt a still more pernicious rule, for while the interest might not have vested until after the prescribed period, the court holds it not too remote simply because it did in fact vest within a proper time.

TAXATION — COLLECTION AND ENFORCEMENT — EQUITY JURISDICTION. —

The plaintiff, an unpaid holder of bonds of the defendant county, obtained judgment but not satisfaction in a United States District Court. A number of writs of mandamus issued commanding the proper county officers to raise a tax. These officials, however, either evaded service, or "wilfully and defiantly refused to obey," with the result that "the plaintiff is utterly remediless at law by mandamus or otherwise." The plaintiff thereupon asked that a commissioner, or receiver, or other officer, be appointed in equity to levy, collect, and pay over the tax. Missouri statutes in force at the time of the bond issue provided that in addition to regular taxes "no other tax for any purpose shall be assessed, levied, or collected" except by order of the circuit court of the county according to a prescribed procedure. *Mo. R. S.*, 1909, §§ 11416-7. *Held*, that the relief asked will not be given. *Yost v. Dallas County*, 35 Sup. Ct. 235.

A discussion of the jurisdiction of the courts to compel the exercise of the taxing power will be found in this issue of the REVIEW, p. 617.

TELEGRAPH AND TELEPHONE COMPANIES — LIABILITY TO ADDRESSEE — DISCLOSURE OF MESSAGE: ILLEGAL TRANSACTIONS OF ADDRESSEE AS DEFENSE. — Two telegrams containing no imputation of immorality on their face were shown by the telegraph company's agent to friends of the addressee. One of the messages was also delivered unsealed to his mother, who read it. As a result of these disclosures it became known that the sender was a prostitute and that the addressee was her paramour. His consequent disrepute resulted in the loss of his position and other serious damages. He now sues the telegraph company. *Held*, that since the action is based on the addressee's own immoral transactions, it will be dismissed. *Western Union Tel. Co. v. McLurin*, 66 So. 789 (Miss.).

The addressee of a telegram has a right of action against the telegraph company for negligence in regard to the transmission of the message. *Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; *Herron v. Western Union Tel. Co.*, 90 Ia. 129, 57 N. W. 696; *Contra*, *Playford v. United Kingdom Electric Tel. Co.*, L. R. 4 Q. B. 706. An addressee may also recover damages for the disclosure of the message. *Cock v. Western Union Tel. Co.*, 84 Miss. 380, 36 So. 392. See *Barnes v. Postal Telegraph-Cable Co.*, 61 N. C. 150, 154. In either case his

claim is properly in tort for the breach of the duty which a telegraph company, as a public servant, owes to its patrons. *Hellams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4. Accordingly, his concurring illegality, on ordinary principles of the law of torts, will be no bar to his recovery, unless it contributed as a proximate cause to the injury. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555; *Gross v. Miller*, 93 Ia. 72, 61 N. W. 385. But if the only right interfered with is the right to security in some illegal transaction, the plaintiff will be denied recovery. *Stockdale v. Omwhyn*, 5 B. & C. 173; *Fivaz v. Nicholls*, 2 C. B. 501. Again, the plaintiff will not be allowed to recover for the violation by the defendant of the duties of a relationship, if those duties exist only in connection with an illicit undertaking. *Turner v. North Carolina Ry. Co.*, 63 N. C. 522; *Levy v. Kansas City*, 168 Fed. 524. But *cf. Western Union Tel. Co. v. Ferguson*, 57 Ind. 495. Analogously, since in the principal case the duty of secrecy owed by the telegraph company to the plaintiff as addressee of the telegram was violated only in regard to the plaintiff's illegal transactions, he is rightly denied recovery. In so far as the message was false, his redress is in libel; in so far as it was true, no recovery should be granted. This conclusion is supported by the fact that had the defendant contracted not to disclose the plaintiff's immoral transactions, the contract could not have been enforced. *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550. See also *Aycock v. Braun*, 66 Tex. 201, 18 S. W. 500.

VENDOR AND PURCHASER — REMEDIES OF VENDOR — RIGHT TO SUE FOR DEFICIENCY AFTER STRICT FORECLOSURE. — The purchaser in a contract for the sale of land paid only a part of the first instalment, and failed entirely to pay the second. The vendor then commenced this action for the overdue instalments, but while it was pending obtained a final decree of strict foreclosure. *Held*, that he cannot recover. *Waite v. Stanley*, 92 Atl. 633 (Vt.).

A vendor who retains the legal title as security usually enforces his rights through foreclosure by sale. *Aycock Bros. Lumber Co. v. First National Bank of Dothan*, 54 Fla. 604, 45 So. 501; *Walker v. Casgrain*, 101 Mich. 604, 60 N. W. 291. If the proceeds of the sale are less than the amount of the debt the vendor will then be entitled to recover the difference either by deficiency judgment or in a separate action. *Blumberg v. Birch*, 99 Cal. 416, 34 Pac. 102. See *Fayette Land Co. v. Louisville & Nashville R. Co.*, 93 Va. 274, 283, 24 S. E. 1016, 1017. Strict foreclosure, since it usually involves hardship to the vendee, should only be granted under exceptional circumstances. *Harrington v. Birdsall*, 38 Neb. 176, 56 N. W. 961; *Flanagan Estate v. Great Central Land Co.*, 45 Ore. 335, 77 Pac. 485. In view of the small part of the purchase price actually paid in the principal case, the decree of strict foreclosure was probably proper. But it seems impossible to sustain this additional action for unpaid instalments. It is true that some jurisdictions hold that strict foreclosure of a mortgage operates as a discharge of the debt only to the extent of the mortgaged property. See *Edgerton v. Young*, 43 Ill. 464, 470; *Hunt v. Stiles*, 10 N. H. 466, 469; JONES, MORTGAGES, 6 ed., § 1567. But even this theory would not permit the vendor to recover more than the deficiency remaining unsatisfied after the return of the property. The analogy, furthermore, is misleading. Recovery in the mortgage cases may be justified on the ground that the land is merely security, and that it should no more satisfy a debt of greater amount under strict foreclosure than under foreclosure by sale. But a vendor who obtains a strict foreclosure has ended the contract and should be unable thereafter to recover against the purchaser. In a few jurisdictions strict foreclosure alone is open to the vendor who has retained the legal title as security. *Todd v. Simonton*, 1 Colo. 54; *Bulton v. Schroyer*, 5 Wis. 598. But even in such jurisdictions recovery of the deficiency should not be allowed, for any resulting

hardship to the vendor arises from the initial mistake of refusing a foreclosure by sale.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — EFFECT ON PRIVILEGE OF AN UNACCEPTED PARDON. — A witness before the federal grand jury refused to answer certain questions upon the ground that it would tend to incriminate him. He was handed a pardon from the President of the United States granting full and unconditional pardon for all offences which he had or might have committed in connection with any matter to which he might testify. He refused to accept the pardon or answer the questions. He was then adjudged guilty of contempt. *Held*, that this judgment be reversed. *Burdick v. United States*, 236 U. S. 79, 35 Sup. Ct. 267.

For a discussion of the effect of an unaccepted pardon upon the privilege against self-incrimination, see NOTES, p. 609.

BOOK REVIEWS

THE ANTI-TRUST ACT AND THE SUPREME COURT. By William H. Taft. New York: Harper and Brothers. 1914. pp. 133.

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The law of restraint of trade and monopoly is founded on public policy. The rules of public policy vary of necessity according to conditions prevailing in different countries and in different periods. The English courts, while declaring that all restraints upon trade are illegal unless reasonable, yet have sanctioned a large measure of freedom of contract between buyer and seller. A liberal test of reasonableness was therefore adopted, and whether by reason of the general acceptance of this policy or of different economic conditions, the higher English courts have not until very recently passed upon the validity of the modern combination to regulate prices, and have not yet declared any such illegal. In contrast with the comparatively simple rules of the English common law to determine the legality of the covenant of the seller of a business or of a partner or employee not to reëngage in business and the simple undoing of such contracts by the refusal of the courts to enforce them, are the decisions of our state and federal courts holding that combinations which have acquired power to regulate prices, restrict output and divide territory, or otherwise unduly restrict competition, are illegal; and under power, usually aided by statute, to grant affirmative relief, ordering their dissolution and the restoration of competitive conditions. The American courts, while starting with the rules of the English common law, have developed a body of law of distinctly American origin based upon a public policy of furthering competition, in which the decisions of the Supreme Court of the United States recognizing, as it were, a national policy, have become of great, if not controlling, importance.

It is this body of law, involved in conflicting economic theories, opposing views of public policy and grave issues of constitutional power, yet so vitally affecting the people of the nation, to which the author addresses this book. As its title indicates, Mr. Taft's book is an exposition of the decisions of the Supreme Court interpreting the Sherman Anti-Trust Law. It is a series of legal essays, beginning with a brief but intelligible outline of the common law beginnings and the constitutional background of the statute, and explaining the effect of each of the major decisions and justifying the principles ultimately established by the court. To a lawyer desiring to ascertain the present status of the law, after a period of rulings by divided courts and some undoubted changes of view, it is a presentation of breadth and candor and accuracy. The author's choice of a publisher indicates that the book is also intended for the

general reader. It reveals in an enlightening and authoritative manner what the Sherman Act and the courts have accomplished in formulating the law and in practical results. Seldom has public opinion been so universally concerned in the progress of the law as in the legal regulation of the trusts, and the writing of this book at the present time is a distinct public service.

In the period closed by the *Standard Oil* (221 U. S. 1) and the *Tobacco Trust* (221 U. S. 106) Cases, two principal questions stand out: one, an issue of constitutional power raised by the application of the statute to a combination of manufacturing companies selling their product in interstate commerce; the other, a problem of interpretation, whether the Sherman Act prohibits all contracts or combinations in restraint of interstate commerce, including those or some of those held reasonable and legal at common law.

The first question arose in the much-discussed *Knight Case* (155 U. S. 1). That case was where a holding company had acquired the stock of manufacturing corporations owning plants in different states and producing practically the entire output of refined sugar in the United States. It was decided that such a combination, while amounting to a monopoly of manufacture, did not show a monopoly of interstate commerce. This decision was reached although it was freely conceded that in the regular course of business the products did enter interstate commerce and could only be disposed of therein. Mr. Taft analyses the *Knight Case* and considers the effect of the subsequent decisions. He concludes that the dissenting opinion of Mr. Justice Harlan represents more accurately the present view of the court (p. 58) and suggests that if the *Sugar Trust Case* were again brought before it, a different result would be reached (p. 83). The author finds the error in the court's refusal to infer that the necessary effect of the union of the refineries was to monopolize interstate commerce (p. 83). The soundness of these criticisms will be conceded and is established by subsequent rulings culminating in the *Standard Oil* decisions, in which elaborate arguments founded upon the *Knight Case* were declared foreclosed by prior decisions (221 U. S. 68). It is further submitted that the drawing of such inference was really prevented by the constitutional view which the court took of the case. The majority opinion is based upon two propositions: one, the distinction made between manufacture and commerce, and the assertion that the combination operated on the former only; the other, that the regulation of manufacture and the acquisition and ownership of properties used for manufacture within the state was a matter within the reserved powers of the states, and consequently affected interstate commerce not directly but only incidentally, and therefore did not fall within the scope of the federal commerce clause.

Support for the first position was drawn from the analogy of decisions concerning the power of the state to prohibit manufacture or tax certain articles before they entered interstate commerce. From these the court reasoned that the mere intent of the manufacturer to export products, which intent might be changed, did not make them subjects of interstate commerce. This reasoning, while true enough in the abstract and of manufacture in ordinary instances, was inapplicable to the situation in the *Knight Case*. There the greater portion of the output could not be marketed except through the channels of interstate commerce. There was a continuous current of commerce between the refineries and the markets in other states. Control of the refineries gave control of the markets and the exact point at which the products entered interstate commerce would seem unimportant. The opinion in truth treated manufacture and commerce as abstractions, rather than from the practical standpoint adopted in later decisions under the Sherman Act. The second proposition was rejected in the *Northern Securities* (193 U. S. 327) and *Standard Oil* (221 U. S. 78) Cases. The *Knight Case* regarded the ownership by a holding company of stocks of corporations owning plants within the states as a matter

reserved for regulation by the states and constitutionally protected from federal interference, and therefore held proof of other restraint upon interstate commerce than resulted therefrom to be necessary. The later cases decide that the holding company, when used as a method of restraining interstate commerce, is not so protected; and as its existence confers power to restrain, dissolution may be ordered to prevent continued violations of the act.

Discussing the question whether the statute embraces contracts legal at common law, Mr. Taft defends the construction adopted in the *Standard Oil Case*. Following the classification made in his noteworthy opinion in the *Addyston Pipe Case* (85 Fed. 271), he enumerates the restraints held reasonable at common law and points out that the opinion in the *Joint Traffic Association Case* (171 U. S. 505) expressly excluded all these from the operation of the statute (p. 63). The combinations involved in the *Joint Traffic Association* and *Northern Securities* cases, he asserts, would have been held unreasonable at common law (pp. 68, 76). This statement, we suggest, is to be read as meaning the common law adopted in this country. When the Sherman Act was passed, there was a considerable body of law against the legality of combinations to regulate prices or restrain competition, developed by state courts in the *Standard Oil*, *Sugar Trust*, *Whiskey Trust*, and kindred litigation.

The same test of reasonableness has not, however, been accepted in England. As early as *Hare v. London & Northwestern Ry. Co.* (2 Johns. & Hen. 80, 103), an agreement between competing railway companies to divide traffic was upheld, because "it is a mistaken notion, that the public is benefited by pitting two railway companies against each other until one is ruined." *Urmston v. Whitelegg* (63 L. T. N. s. 455), cited by the author in his opinion in the *Addyston Pipe Case* as holding illegal an agreement of dealers to maintain prices, was affirmed in the Court of Appeals on the ground that the agreement was unreasonable as to both time and area (55 J. P. 453); and was explained and a contract to keep up prices upheld in *Cade v. Daly* (1910, 1 Ir. R. 306). The *Hare Case* received little attention, and it was not until after the *Standard Oil* decision that the law was definitely declared in England. In the case of *Attorney General v. Adelaide Steamship Co.* (1913, A. C. 781), the House of Lords held a very complete system of contracts between owners of coal mines and carriers who sold the coal, restricting and apportioning the output and fixing prices, not "to the detriment of the public" within the meaning of the Australian statute. An arrangement of manufacturers of salt involving these elements, and in addition, a system of restrictive contracts, was held valid at common law and enforceable as between the parties, in the absence of proof that the prices fixed were unreasonable, in *Northwestern Salt Co. v. Electrolytic Salt Co.* (1914, A. C. 461). These two decisions seem to settle the rule in England that contracts or the possession of power to regulate prices or restrain competition among the parties, though accompanied by division of territory and restriction of output, are not *per se* unlawful; but that to show illegal restraint of trade there must be proof that (1) trade has been actually restrained, and (2) unreasonable prices have resulted.

H. F. S.

LEADING CASES IN CANADIAN CONSTITUTIONAL LAW. By A. H. F. Lefroy, K.C. Toronto: The Carswell Company. 1914. pp. xxi, 112.

Here are presented abstracts of thirty-one cases dealing with the British North America Act, 1867. Almost all were decided in the Judicial Committee of the Privy Council. Extracts from the opinions are given when necessary. Yet the greater part of almost every abstract is in the words of the author; and the author has included with his abstract of each case such comments as

will aid the student to understand the case, and place it in its proper relation to the whole subject.

As the British North America Act is a statute act of the British Parliament, a body in which Canada does not have representation, and as it is amendable like any other British statute, it resembles an Act of Congress as to a territory, rather than a constitution in the sense in which that word is used in the United States. There is, however, an important resemblance to a constitution, for the instrument deals with government and specifies the legislative powers of the Dominion and of the constituent Provinces.

The cases of greatest interest are probably those indicating that the British Parliament still retains legislative power in Canada (p. 8), that a Provincial legislature may delegate power to make local regulations for the government of taverns (p. 10), that warehouse receipts taken by a bank are within the exclusive jurisdiction of the Dominion Parliament as distinguished from Provincial legislatures, because coming within a class specified in the British North America Act, sec. 91, par. 15, as "banking, incorporation of banks, and the issue of paper money" (p. 14), that the silence of the Dominion Parliament as to matters which the Act places within its exclusive jurisdiction does not enlarge the legislative powers of the Provinces (p. 20), that the exclusive legislative powers of the Dominion Parliament need not be exercised as to the whole geographical extent of the Dominion (p. 26), that the Dominion Parliament may enlarge the powers of the Provincial courts by imposing upon them a jurisdiction as to matters not within the authority of the Provincial legislatures (p. 27), that a part of a statute may be valid although the remainder is *ultra vires* (p. 37), that the Dominion's exclusive power as to the regulation of trade and commerce, given in sec. 91, par. 2, does not prevent a Provincial Parliament from legislating as to local, sanitary and police matters, and, more specifically, as to fire insurance (pp. 40, 53), that a company incorporated by the Dominion for purposes within the Dominion's exclusive powers cannot be regulated by a Provincial legislature as to matters expressly authorized by the company's charter (p. 49) and that the definition of the phrase "direct taxation" is a legal problem and not necessarily to be solved in harmony with the views of economists (p. 62).

An appendix contains the essential parts of the British North America Act; by presenting in brief form both the Act and the chief decisions, the book achieves well its purpose of giving to a student a rapid and vivid view.

E. W.

GERMAN LEGISLATION FOR THE OCCUPIED TERRITORIES OF BELGIUM. Official Texts, edited by Charles Henry Huberich and Alexander Nicol-Speyer. The Hague: Martinus Nijhoff. 1915. pp. viii, 108.

On August 26, 1914, the German government vested in a Governor-General the legislative power over the occupied territories of Belgium. The laws and ordinances promulgated by the Governor-General are presented in this small volume. They bear dates from September 2, to December 20; but, unless otherwise specified, they took effect from the time of promulgation in the official publication entitled *Gesetz- und Verordnungsblatt für die okkupierten Gebiete Belgiens*, namely, from September 5, to December 26. The original text is German; but there are official translations into French and Flemish, and the three versions as given in the *Gesetz- und Verordnungsblatt* are presented in this volume without comment. There is a short introduction, containing, among other things, such provisions of the Hague Convention of 1907 on the Laws and Customs of War on Land as deal with authority in occupied territory (Hague Convention, 1907, No. 4, Arts. 42, 43, 45, 46, 48, 49, 51, 53).

First comes a proclamation in which the most interesting passages are:

"Every hostile act of the inhabitants against the German military forces and every attempt to disturb their communication with Germany or to embarrass or destroy railroads or telegraph or telephone service will be punished very severely. Any resistance or revolt against German administration will be repressed without pardon. It is the hard necessity of war that punishment for hostile acts strikes both the guilty and the innocent. Thus on all reasonable citizens the duty is the more clearly imposed of repressing the turbulent in order to keep them from any attack on public order." An ordinance dated October 3, makes German coin and paper money a legal tender. One of September 30, prohibits exporting horses and food. One of October 26, provides that enumerated articles, useful for military purposes, must not be exported without permission, and may be seized by the Government, payment being made at prices fixed by a commission appointed by the war department in Berlin. One dated November 3, forbids making remittances to Great Britain or France. One dated November 12, provides for the continuance of the taxes for the support of local administration. One dated December 22, revokes the power of La Banque Nationale de Belgique to issue bank notes, reciting that this bank had transferred a great part of its assets to London, but continues the legal quality of the bank's notes "legally issued."

Indeed, almost all enactments are obviously connected with war.

One, however, is of a wholly different character. It is dated December 15, and it puts into force from January 1, 1915, with minute detail, a Belgium law of May 26, not then promulgated by the Belgian government, amending in minute details the law as to work by women and children, especially in mines, factories, dangerous occupations, etc.

In short, as was to be expected, the legislation by the Germans in the period covered by this volume, though dealing with both military and civil interests, makes no attempt to change the great body of Belgian law, and deals almost exclusively with emergencies.

E. W.

THE LAW OF WILLS AND THE ADMINISTRATION OF ESTATES. By William Patterson Borland. Enlarged Edition. Kansas City: Vernon Law Book Company. 1915. pp. xv, 723.

THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTORS' PROPERTY. By Garrard Glenn. Boston: Little, Brown, and Company. 1915. pp. xlv, 461.

NATIONAL TAX ASSOCIATION. Proceedings of the Eighth Annual Conference. Madison, Wis.: National Tax Association. 1915. pp. 499.

A POCKET CODE OF THE RULES OF EVIDENCE. By John Henry Wigmore. Massachusetts Edition. By Charles N. Harris. Boston: Little, Brown, and Company. 1915. pp. cii, 970.

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DOES A PARDON BLOT OUT GUILT?

IT has been said by the Supreme Court of the United States in a leading case,¹

"A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. . . . It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . . It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity."

and these words have been often quoted subsequently.²

There is in the human mind a love of paradox which finds its expression in all professions. In the law there has been a vast

¹ *Ex parte Garland*, 4 Wall. 333, 380 (1866).

The Supreme Court at an earlier day had expressed through Chief Justice Marshall more accurately the nature of a pardon.

"A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." *United States v. Wilson*, 7 Pet. 150, 159 (1833).

This statement has been quoted as an accurate one in *Burdick v. United States*, 236 U. S. 79, 89 (1915).

² *Illinois Central R. v. Bosworth*, 133 U. S. 92, 103 (1890); *Ex parte Weimer*, 8 Biss. 321, 324 (1878); *In re Spenser*, 5 Sawy. 195, 199 (1878); *In re Executive Communication*, 14 Fla. 318, 319 (1872); *Singleton v. State*, 38 Fla. 297, 302, 21 So. 21, 22 (1896); *United States v. Athens Armory*, 35 Ga. 344, 363 (1868); *People v. Court of Sessions*, 141 N. Y. 288, 294, 36 N. E. 386, 388 (1894); *Knapp v. Thomas*, 39 Oh. St. 377, 381 (1883); *Wood v. Fitzgerald*, 3 Ore. 568, 577 (1870); *Diehl v. Rodgers*, 169 Pa. St. 316, 322, 32 Atl. 424, 426 (1895); *Carr v. State*, 19 Tex. App. 635, 661 (1885); *Edwards v. Commonwealth*, 78 Va. 39, 43 (1883).

deal of it and there is still too much. When it is said that "In the eye of the law the offender is as innocent as if he had never committed the offence," we have something of the sort. It is asserted that the law regards as true what is inherently false. Everybody knows that the word "pardon" naturally connotes guilt as a matter of English. Everybody also knows that the vast majority of pardoned convicts were in fact guilty; and when it is said that in the eye of the law they are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad.

It may perhaps be supposed that this is a mere criticism of language and that the substance of the statement is merely that the law will impose no more penalty upon the offender than it would upon an innocent man. If no more than this is intended, then the latter form of expression should be used; for the language criticised, if its natural meaning is accepted, means more than this and, as will be seen, endeavors have frequently and sometimes successfully been made to carry this language to logical consequences productive of highly undesirable results. If the offender really is to be treated as an innocent man after his pardon, the offence which he has committed cannot properly be made ground for removing him from the office of an attorney or trustee, or from any other office. He not only cannot be disqualified as a witness, but proof of his conviction should not be allowed to discredit him. If an alien, he should not be debarred from naturalization.

Though the language of the Supreme Court of the United States is perhaps the most extreme statement which has been made of the effect of a pardon, it was not made without some warrant from English precedents; but even if these precedents fully justified the conclusions which have been drawn from them, the conclusions should be attacked as inherently wrong. There is, however, greater reason for such an attack if it can be shown that to a considerable degree the early precedents have been misunderstood, or departed from. The truth seems to be as Lord Coke says, "*Pœna mori potest, culpa perennis erit.*"³ But confusion has been caused

³ *Brown v. Crashaw*, 2 Bulst. 154 (1614). See also the definition of Marshall, C. J., quoted (p. 647, n. 1) from *United States v. Wilson*, 7 Pet. 150 (1883), quoted with approval in *Burdick v. United States*, 236 U. S. 79, 89 (1915); *People v. Bowen*, 43 Cal. 439, 442 (1872); *Territory v. Richardson*, 9 Okla. 579, 584, 60 Pac. 244, 245 (1900); and language quoted *infra*, p. 658, n. 41, from *Cook v. Middlesex*, 2 Dutch. (N. J.) 326,

because certain punishments which the law attached to crime were of a general sort affecting civil capacity. These consequences of the legal infamy of the convict were disposed of by the pardon, in the same way as other punitive consequences of conviction.⁴

The earliest statement of the English law of pardon is made apparently by Bracton,⁵ who wrote in about the middle of the thirteenth century. He says of the effect of a pardon:

"But in all the aforesaid cases, whatever may have been the cause, when the outlawry has been made duly and according to the law of the land, a person is not restored except to the king's peace alone, that he may go and return and contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted. For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot give by his own grace. Likewise a person justly and duly outlawed is not restored to anything except to the king's peace, that he may go and return and have protection, but he cannot be restored to his rights of action and other things, for he is like a new-born infant and a man as it were lately born. Likewise inlawry does not restore a person to his previous actions and obligations, nor to his homage nor fealties, nor to his oaths, nor to other things dissolved by his outlawry, against the will of those by whose will they were previously united and confirmed, and accordingly neither to his inheritances nor to his tenements to the prejudice of the lords, and so they cannot be restored to those things to which they had only a right. But no one is bound to them by preceding obligations, but they are bound to all others, that they may not be in a better condition on account of their outlawry, since they ought to be in a worse condition."

The phrase in this extract that a pardoned man "is like a new-born infant and a man as it were lately born" seems to be the basis of any subsequent assumption that a pardoned offender is to be regarded as an innocent man. The extract, however, shows clearly

331 (1857). Contrast, however, with these expressions the denial by Mitchell, J., in *Diehl v. Rodgers*, 169 Pa. St. 316, 319, 32 Atl. 424 (1895), of the correctness of Coke's statement that the guilt remained; and also the statements inconsistent with Coke's which are criticised in this article.

⁴ "When, therefore, the judgment is pardoned, the legal infamy flowing from it, is equally disposed of by the pardon." *People v. Pease*, 3 Johns. Cas. (N. Y.) 333, 334 (1803).

⁵ Twiss's translation, vol. 2, p. 371.

enough that the writer's idea was not that the offence was regarded by the law as not having been committed, or even as no longer existing, but that the offender, so far as concerned the future, acquired the legal capacity of an innocent man. At a time when conviction destroyed civil rights this was a very important matter. There is nothing fictitious in Bracton's statement, and in view of the criminal law of the time, his analogy of the new-born infant is not inappropriate. The following extract from Pollock and Maitland's History⁶ indicates also clearly enough that the eye of the law was not formerly so blind as to be unable to see that a pardoned felon had committed the crime of which he had been convicted.

"The king could not protect the man-slayer from the suit of the dead man's kin. Even when the pardon was granted on the score of misadventure, this suit was saved by express words. Proclamation was made in court inviting the kin to prosecute, but telling them that they must come at once or never. What could the kin do in such a case? They could make themselves extremely disagreeable; they could extort money. In Henry III.'s day Mr. Justice Thurkelby was consulted by a friend who had obtained a pardon, but was being appealed. The advice that the expert lawyer gave was this: 'You had better go to battle; but directly a blow struck cry "Craven" and produce your charter; you will not be punished, for the king has given you your life and members.'"

Early in the reign of Edward III, it was ruled⁷ that one appealed of felony who broke prison should lose his right of battle, but if pardoned by the king, his right was restored. Here it will be noticed that there had never been a conviction of felony, and the ground of decision seems to be that breaking prison was an injury to the king only and he had pardoned it.

In 1410⁸ the validity of indictments presented by a grand jury of which one member was outlawed and another a pardoned felon was drawn in question and the conclusion of the case is as follows:

"And then on the opinion of all the justices, since one of the indictors was outlawed and another was excused and acquitted by the benefit of a general pardon, so that they were not *probi et legales homines* to inquire as the law wishes, it was awarded that all the indictments by them shall be taken as annulled."

⁶ Vol. 2, p. 481.

⁷ LIB. ASSIZ. fol. 1, pl. 3; FITZ H. ABR. CORONE, pl. 154, 281.

⁸ 11 HEN. IV, fol. 41 b, pl. 8.

The same conclusion was reached about two centuries later by Lord Coke⁹ who said of a pardoned felon not only that "he is not a fit person to serve on a jury," but also "by the same reason the testimony of such an one for a witness is in all cases to be rejected."¹⁰

No case arose subsequently which indicated any enlargement of the views of the English Court as to the effect of a pardon until *Cuddington v. Wilkins*, decided in 1615.¹¹ This decision has probably been the main foundation of the impression that after a pardon the law could not thereafter see the convict's guilt. The case was as follows: "Cuddington brought an action of the case against Wilkins for calling him a thief. The defendant justified, because beforetime he had stolen somewhat. The plaintiff replied, that since the supposed felony, the general pardon in the seventh year of the king was made, and makes the usual averment to bring himself within the pardon. Whereupon the defendant demurs." The court said the felony was by pardon extinct; and the case "was adjudged for the plaintiff, for the whole court were of opinion that though he was a thief once, yet when the pardon came it took away, not only *poenam*, but *reatum*, for felony is *contra coronam et dignitatem regis*," and the report proceeds:

"Now when the king had discharged it, and pardoned him of it, he had cleared the person of the crime and infamy, wherein no private person is interested but the Commonwealth, whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all general wrongs belongs."

The case is referred to again in a later part of the same reports, four years afterwards, in a case of *Searle v. Williams*,¹² where Hobart, C. J., says:

"And therefore I hold that if a man shall call him felon, or thief, he may have his action, as upon any other pardon, which we resolved in the case of *Cuddington v. Wilkins*."

But that the court meant that the legal infamy of the conviction was removed, not that the offender was "as innocent as if he had

⁹ *Brown v. Crashaw*, 2 Bulst. 154 (1614). But see *Puryear v. Commonwealth*, 83 Va. 51, 1 S. E. 512 (1887).

¹⁰ On this point more recent decisions have reached a contrary conclusion.

¹¹ Hob. 67, 81; s. c. *Brownl. & G.* 10.

¹² 2 Hob. 288, 294 (1618).

never committed the offence" is evident from the following sentence in the report:

"It was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain after he be cured or manumised, but that he had been a thief or villain he might say."¹³

The immediate effect of the decision was the reversal of Coke's *dictum* that a pardoned felon could not be permitted to testify.¹⁴

The protection of a pardoned convict from being called by a name appropriate to his crime, and the restoration of his competency to testify, were sometimes expressed by stating that the convict acquired a new "credit" or "credit and capacity." The fact that this mode of expression is used by Hawkins in his "Pleas of the Crown"¹⁵ and by Blackstone in his "Commentaries,"¹⁶ has led to the habitual quotation of these words subsequently. But the decision even in *Cuddington v. Wilkins*,¹⁷ if the distinction which the court there took between saying he *is* a thief and he *was* a thief is borne in mind, amounts to no more than this, that as the plaintiff had been cleared of the legal consequences of infamy, a statement in the present tense, implying that he was still infamous, was slanderous. Nor does the admission of the testimony of a pardoned felon imply that credit must be given to his testimony.¹⁸

¹³ Hob. 81, 82 (1615). The principal case was followed in *Leyman v. Latimer*, 3 Ex. D. 15 (1877), on very similar facts, and the court upheld the validity of the distinction taken in *Cuddington v. Wilkins*, between the legality of using the present and the past tense.

¹⁴ In *Celier's Case*, T. Ray. 369 (1680), "It was debated, That admit a witness be convicted of felony, and afterwards pardoned, whether he shall thereby be restored to be a good witness? and my lord chief justice Scrogs and myself were of opinion, That he could not, because the pardon doth take away the punishment due to the offence, but cannot restore the person to his reputation; and of that opinion was justice Nichols in *Cuddington and Wilkins'* case; Moor 872, pl. 1213. But my brother Jones and Dolben *contra*; and so afterwards did I conceive; for in the case of *Cuddington and Wilkins*, as 't is reported in Hobart, 't is said, That the pardon takes away not only *poenam*, but *reatum*." See also *King v. Crosby*, 5 Mod. 15 (1695); *Rex v. Castlemain*, T. Ray. 379 (1680); *Rookwood's Case*, Holt 683 (1696).

¹⁵ Bk. 2, c. 37, § 48 (title Pardon).

¹⁶ Vol. 4, p. 402.

¹⁷ Hob. 67, 81 (1615).

¹⁸ Thus in *BACON, ABR.*, title Pardon (H), it is said: "A pardon restores a man to his credit so as to enable him to be a witness, but yet his credit must be left to the jury."

In *Rookwood's Case*, Holt 683, 685 (1696), Holt said, "The pardon restores him to his former capacity," but added, "The conviction indeed might be objected to his credit."

The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

The importance of the distinction suggested may be illustrated by modern decisions which generally support in their results the argument here advanced, but often not without finding some trouble to escape from the effect of the statement in *Ex parte Garland*¹⁹ and similar statements to the effect that a pardoned convict is to be treated as if he were innocent.

The question still most frequently raised concerns the capacity of a pardoned criminal to testify. The modern decisions, following the earlier precedents rightly hold that a pardon removes this incapacity,²⁰ except in the case of perjury. The law of England here made an exception and the testimony of a convicted perjurer was totally inadmissible.²¹ Probably this is still the law of England and a few cases in the United States have accepted the distinction between perjury and other crimes.²² But unless it can be maintained successfully that there is a rule of evidence which

¹⁹ 4 Wall. 333, 380 (1866).

²⁰ *Boyd v. United States*, 142 U. S. 450 (1892); *Thompson v. United States*, 202 Fed. 401 (1913); *Singleton v. State*, 38 Fla. 297, 303, 21 So. 21, 22 (1896); *Roberson v. Woodfork*, 155 Ky. 206, 159 S. W. 793 (1913); *Diehl v. Rodgers*, 169 Pa. St. 316, 32 Atl. 424 (1895); *State v. Foley*, 15 Nev. 64, 68 (1880); *Easterwood v. State*, 34 Tex. Cr. App. 400, 31 S. W. 294 (1895); *Perry v. State*, 155 S. W. 263, (Tex. Cr. App.) (1913). This is true even though the pardon is not given until after the convict has served his sentence. *People v. Bowen*, 43 Cal. 439 (1872); *State v. Blaisdell*, 33 N. H. 388 (1856); *United States v. Jones*, 2 Wheeler's Crim. Cas. (N. Y.) 451 (1824); *Rivers v. State*, 10 Tex. App. 177 (1881).

²¹ *Wicks v. Smalbrooke*, 1 Siderf. 51 (1661); *Rex v. Greepe*, 2 Salk. 514 (1697); *Rex v. Crosby*, 2 Salk. 689 (1695); *Rex v. Ford*, 2 Salk. 691 (1700); *Anon.*, 3 Salk. 155 (1697).

²² *Houghtaling v. Kelderhouse*, 1 Parker Crim. Rep. (N. Y.) 241 (1851). See also *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30 (1816), and an article signed G., presumably by Professor Greenleaf, in 11 AM. JUR. 356.

In *Foreman v. Baldwin*, 24 Ill. 298 (1860), the same conclusion was reached in regard to a convict pardoned for larceny in view of a statute prohibiting the acceptance of the testimony of one pardoned for that crime.

not only excludes altogether from consideration the testimony of one who has testified falsely in the case on trial, but also excludes the testimony of one who has previously committed perjury, though never convicted thereof, these decisions cannot be accepted for they involve the conclusion that not the act but the criminal conviction is the basis of exclusion, and it seems clear that the legal consequences of the conviction as such are removed by the pardon. The Supreme Court of Pennsylvania in a careful decision criticising and declining to follow the earlier cases, has admitted the testimony of a pardoned perjurer.²³

If, however, the eye of the law were unable to distinguish between a pardoned convict and one who had never been found guilty of a crime, proof of the conviction should be as inadmissible to affect the credibility of the witness as it is to effect his capacity to testify; yet it has always been the law and still is that in spite of the pardon the conviction may be used to discredit the witness.²⁴

The right of suffrage forfeited by conviction is restored by a pardon;²⁵ and the same principle seems applicable here that governs the capacity of a witness. As it was not guilt but conviction which took away the right, the deprivation of it is a legal punishment, and as such a pardon should excuse it.

But under a statute which requires as a condition of naturalization that the alien seeking to be naturalized must prove that he has behaved as a man of good moral character during his residence in the United States, it has been rightly held that a pardoned convict is not within the statute.²⁶ Here it is not conviction, but character, which is in question. The court after quoting from *Ex parte Garland*²⁷ said:

²³ *Diehl v. Rodgers*, 169 Pa. St. 316, 32 Atl. 424 (1895). The same conclusion is reached in *Roberson v. Woodfork*, 155 Ky. 206, 159 S. W. 793 (1913), but the court apparently was unaware that a distinction had ever been taken between perjury and other crimes.

²⁴ *Rookwood's Case*, Holt 683, 685 (1696); *United States v. Jones*, 2 Wheeler Crim. Cas. (N. Y.) 451 (1824); *Baum v. Clause*, 5 Hill (N. Y.) 196 (1843). It has even been held that evidence of the pardon is not admissible as tending to remove the discredit of the conviction. *Martin v. Commonwealth*, 25 Ky. L. Rep. 1928 (1904). Cf. 2 WIGMORE, EVIDENCE, § 1116.

²⁵ *In re Executive Communication*, 14 Fla. 318 (1872); *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407 (1892); *State v. Lewis*, 111 La. 693, 695, 35 So. 816, 817 (1904); *Jones v. Board*, 56 Miss. 766 (1879); *Wood v. Fitzgerald*, 3 Ore. 568 (1870).

²⁶ *In re Spenser*, 5 Sawy. 195, 199 (1878).

²⁷ 4 Wall. 333, 380 (1866).

"And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence."

It may be doubted if a court requested to appoint such a person a trustee, would feel sure that he had even been restored to "a state of innocence."

In an Arkansas case,²⁸ it appeared that a probate judge had been convicted of felony and had appealed; while the appeal was pending, he received a pardon which he thereupon pleaded and was discharged. It was held on *quo warranto* proceeding that the unreversed conviction prevented him from exercising the office of a judge.²⁹

A Virginia statute prescribed a five years' sentence on conviction for a second time of a minor offence. It was held illegal to sentence for this period one who had been pardoned for the first offence.³⁰ This decision seems wrong. The court said that the first offence was in legal contemplation "blotted out." But what has been said sufficiently shows that the law can still see perfectly well, if it is material, that the pardoned offence was committed. The statutory punishment of five years' imprisonment was not a punishment for the first offence, nor partly for the first and partly for the second. It was a punishment imposed by law for the second offence exclusively; and neither in law nor in reason does there seem any warrant for punishing more lightly the second offence of one whose first offence has been pardoned.

In several cases the question has arisen of disbarring lawyers who had been convicted of crime but pardoned. The courts have found some difficulty in escaping the language of *Ex parte Garland*,³¹ and in Texas, it has actually been held that a pardon is a complete defence to disbarment proceedings based on the pardoned offence.³²

²⁸ *State v. Carson*, 27 Ark. 469 (1872).

²⁹ See, to the same effect, *Commonwealth v. Fugate*, 2 Leigh (Va.) 724 (1830).

³⁰ *Edwards v. Commonwealth*, 78 Va. 39 (1883).

³¹ 4 Wall. 333, 380 (1866).

³² *Scott v. State*, 6 Tex. Civ. App. 343, 25 S. W. 337 (1894).

Indeed, the case of *Ex parte Garland* itself³³ concerned the right of a pardoned offender to practice law before the Supreme Court, and though the decision of the court may be right, since the only ground for supposing that complicity in the war of the rebellion (the offence in question) would involve disbarment as a consequence, was a statute which imposed as a penalty disability to practice before the court, some of the reasoning of the case would support the conclusion which the Texas court actually reached.

The Maine court only escaped from such an embarrassing conclusion by discovering that the defendant had been guilty of another crime beside that for which he had been convicted and pardoned. He had forged a deposition and had been convicted for forgery. The court held that pardon for this offence did not excuse him from his guilt in offering the deposition as evidence in court.³⁴

The New York court, though disbarring the offender, was itself guilty of the following unpardonable reasoning:

"The pardon does reach the offence for which he was convicted, and does blot it out, so that he may not now be looked upon as guilty of it. But it cannot wipe out the act that he did, which was adjudged an offence. It was done, and will remain a fact for all time."³⁵

How a man who "may not now be looked upon as guilty" of a crime, nevertheless did the act which was a crime and must now be disbarred for it, it is difficult to imagine.

In Kentucky, also, disbarment proceedings were successful but the reasoning of the opinion not wholly satisfactory.³⁶

An interesting case to compare with these is an English decision³⁷ which held a pardoned convict entitled to engage in the business of selling liquor at retail although an Act of Parliament provided that "Every person convicted of felony shall forever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid. . . ." It will be observed that this statute in form imposes a disability to carry on a certain business as a penalty for

³³ 4 Wall. 333 (1866).

³⁴ *Penobscot Bar v. Kimball*, 64 Me. 140 (1875).

³⁵ In the matter of an Attorney, 86 N. Y. 563, 569 (1881). See also, In the matter of Niles, 48 How. Prac. (N. Y.) 246 (1875); In the matter of E., 65 How. Prac. (N. Y.) 171 (1879).

³⁶ *Nelson v. Commonwealth*, 128 Ky. 779, 109 S. W. 337 (1908).

³⁷ *Hay v. Justices*, 24 Q. B. Div. 561 (1890).

conviction of crime, but fairly construed and having in mind the obvious purpose of the statute, there can be no doubt that the intent of Parliament was to emphasize the requirement of good character (which doubtless existed apart from the statute) as a qualification for conducting the business of selling liquor at retail. The decision warrants the conclusion that if a statute should provide that no one should be admitted to the practice of the law or of medicine, or should be elected a judge, who had been convicted of felony, a pardon would qualify him. The truth is that while pardon dispenses with punishment, it cannot change character, and where character is a qualification for an office, a pardoned offence as much as an unpardoned offence is evidence of a lack of the necessary qualification.

The varied possibilities of a doctrine which denies to the law the possibility of distinguishing between a pardoned convict and one who has never committed a crime are illustrated by an Ohio decision.³⁸ This was a *quo warranto* proceeding to prevent certain persons from exercising the office of police commissioners from which they had been removed by the governor, and the question was raised as to the sufficiency of the causes for their removal set forth by the governor. One of the causes was that the commissioners had appointed to a position on the police force one Mike Mullen who, the Governor asserted, was "a man of notorious bad character;" and Mike Mullen had not only been appointed but subsequently promoted. It appeared that Mullen had been convicted of crime, but had subsequently been pardoned. It was urged in defence of the commissioners that Mike Mullen's guilt had been "blotted out" and the offence obliterated, and therefore that it was proper to appoint and promote him. This view was actually taken by a dissenting judge. The majority of the court, however, did not allow their common sense to be impaired by judicial *dicta*, and said:

"Whatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen."³⁹

³⁸ *State v. Hawkins*, 44 Oh. St. 98, 5 N. E. 228 (1886).

³⁹ *State v. Hawkins*, 44 Oh. St. 98, 117, 5 N. E. 228, 237 (1886). The opinion continues:

"It is a perversion of language to give the views expressed by Judge Okey in Knapp

If one who has paid a fine on conviction of crime and is subsequently pardoned, is indeed an innocent man, or is to be so regarded by the law, he should have the fine which he has paid returned to him. An early Georgia decision actually reached this result.⁴⁰ But the contrary conclusion was reached in New Jersey on elaborate consideration.⁴¹

A similar question arose in the Supreme Court of the United States.⁴² One who had been convicted of crime was granted a pardon conditional upon his returning certain lands of which he had been charged with defrauding the government. Before returning the lands he made an agreement with the District Attorney that he should be reimbursed for certain expenditures which he had made upon the land. If he was to be treated as an innocent man, he certainly had a moral right to have his outlay returned, and under the law of Louisiana (where the case arose) perhaps a legal right. The Supreme Court, however, indulged in no fictitious belief in his guilt having been blotted out, and refused to enforce in his favor the agreement with the District Attorney.

A probable reason why courts have been willing to continue a

v. Thomas, 39 Oh. St. 377, such a construction. He never meant anything of the kind." One who reads Judge Okey's remarks which are in substance taken from *Ex parte Garland*, 4 Wall. 333, 380 (1866), will be inclined to think that the error is rather in the language of Judge Okey than in the deductions of those who seek to attach to it the meaning that Mike Mullen's character was as good as if he had never committed an offence.

⁴⁰ *Flournoy v. Attorney-General*, 1 Ga. 606 (1846).

⁴¹ *Cook v. Freeholders of Middlesex*, 2 Dutch. (N. J.) 326, 331, 333 (1857). "If pardons were granted upon the idea of the innocence of the party pardoned, there would be manifest justice in returning the fine not only, but also in making full indemnity for all the injury sustained by reason of the conviction. And a recent decision is based upon the ground that a pardon proceeds upon the idea of innocence. The power, it is said, is given to the executive to relieve against the possible contingency of a wrongful conviction. I am not aware that this idea of *innocence* has ever been assumed by any writer upon government, or law, or ethics, as the true foundation of the pardoning power in the state. No doubt a clear case of innocence presents the strongest ground for the immediate remission of all the penalties of conviction. But that is not in practice the ground upon which pardons are or ought to be based, nor is it the ground upon which the pardoning power in a government is created and sustained. Pardon implies guilt. If there be no guilt, there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of *right* but of *grace*. A party is acquitted on the ground of innocence; he is pardoned through favor. And upon this very ground it is that the pardoning power is never vested in a judge."

⁴² *Bradford v. United States*, 228 U. S. 446 (1913).

mode of expression which suggests that a pardoned convict is the equal in character and conduct of an innocent man is because it has seemed desirable to conceal an injustice which the criminal law inflicts upon an innocent man unjustly accused and convicted. Under the law of England no new trial was possible in case of felony.⁴³ The only redress, therefore, for an unjust conviction was a pardon. Of this procedure an acute English critic (afterwards a judge) said:

"However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.

"This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and especially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious."⁴⁴

This defect in English procedure was corrected by the Act of 1907 creating a court of criminal appeal, with the widest powers, including the right to hear further evidence and decide questions of fact.

In the United States new trials are permitted without the aid of statute, provided the order is made before the end of the term;⁴⁵ but only under very exceptional circumstances is there any way by which newly discovered evidence proving a prisoner's innocence or the unfairness of his trial can be made available after the term in which judgment against him was given has expired, except by pardon.⁴⁶ How extreme may be the results of the prevailing doctrine

⁴³ *Regina v. Murphy*, L. R. 2 P. C. 535 (1869).

⁴⁴ 1 STEPHEN, HISTORY OF THE CRIMINAL LAW, p. 312.

⁴⁵ *Sparf v. United States*, 156 U. S. 51, 175 (1895).

⁴⁶ *United States v. Mayer*, 235 U. S. 55 (1914). An unpublished decision of Dodge,

is shown by the facts in a recent Colorado case.⁴⁷ There the innocence of a convicted defendant had been proved not only by the confession but by the subsequent conviction of the real criminal; but because the term had expired the court refused to set aside the conviction and suggested that the only recourse left to the defendant was to apply for a pardon.

As courts apparently do not feel justified in adopting of their own motion a flexible procedure permitting them to do justice after the close of a term, statutes should be passed authorizing them to set aside a conviction or grant a new trial, at any time, in their discretion, when the facts warrant such relief.

Although the reasons which should justify a court in reversing a previous decision or ordering a new trial after the expiration of the term, are far stronger in criminal than in civil cases, in fact by statute or rules of equity a considerable measure of relief is allowed in civil cases, while in criminal cases the occasions are few indeed where the end of the term in which conviction was had is not final.

All the arguments which justify giving relief in civil cases are ten times stronger when applied to criminal cases. To be deprived, by a purely technical rule, of money or property which justly belongs to one, when this can be proved and when there has been no fault in not making earlier proof, is hard enough; but when the stake is life or liberty and reputation, it is an intolerable grievance to lose when newly discovered evidence makes it clear that injustice has been done. Moreover, in a criminal case, undoing what has been done even after a long time works no injury to others, in working

J., rendered in the Massachusetts District Court on the remanding by the Circuit Court of Appeals of *Trafton v. United States*, 147 Fed. 513 (1906); *United States v. New York Cent. & H. R. R. Co.*, 164 Fed. 324 (1908); *United States v. Rogers*, 164 Fed. 520, 521 (1908); *Howard v. State*, 58 Ark. 229, 24 S. W. 8 (1893); *Beard v. State*, 81 Ark. 515, 99 S. W. 837 (1907); *Klink v. People*, 16 Colo. 467, 27 Pac. 1062 (1891); *Saleen v. People*, 41 Colo. 317, 92 Pac. 731 (1907); *Dobbs v. State*, 62 Kan. 108, 61 Pac. 408 (1900); *Asbell v. State*, 62 Kan. 209, 61 Pac. 690 (1900); *Hamlin v. State*, 67 Kan. 724, 74 Pac. 242 (1903); *Holt v. State*, 78 Miss. 631, 29 So. 527 (1900); *Fugate v. State*, 85 Miss. 94, 37 So. 554 (1904); *State v. Williams*, 147 Mo. 14, 19, 47 S. W. 891 (1898); *Appo v. People*, 20 N. Y. 531 (1860); *Leache v. State*, 22 Tex. App. 279, 3 S. W. 539 (1886); *Kinch v. State*, 156 S. W. 649 (Tex. Cr. App.) (1913); *State v. Superior Court*, 15 Wash. 339, 46 Pac. 399 (1896); *State v. Armstrong*, 41 Wash. 601, 84 Pac. 584 (1906). See, however, *United States v. Williams*, 57 Fed. 201 (1893); *United States v. Radford*, 131 Fed. 378 (1904); *Gross v. Wood*, 117 Md. 362, 83 Atl. 337 (1912); *Wickel v. Mertz*, 49 Pa. Sup. 472 (1911); *State v. David*, 14 S. C. 428 (1880).

⁴⁷ *Saleen v. People*, 41 Colo. 317, 92 Pac. 731 (1907).

justice to the accused. There are no *bonâ fide* purchasers to be considered. No property rights will be disturbed. And while in civil suits the original winner will reluctantly part with his gains, and may feel harshly treated in being disturbed after the lapse of time, however unjust the original decision may have been, the government loses nothing which it should care to keep in reversing an unjust conviction of crime, when the injustice first appears, whether that is early or late. It is not only the case of an innocent man who has been convicted which makes desirable a statute enlarging the powers of a criminal court, but the case of a defendant whose innocence is not clear and whose trial has been unfair. Newly discovered evidence after the end of the term may show a degree of bias or disqualification on the part of jurymen for instance which should require a new trial. In such a case it is unjust to treat the conviction as final, and it is unsatisfactory to pardon one whose innocence is not clear. The matter has been accurately stated by the Supreme Court of Indiana.

"The power to pardon does not exclude the right to hear and determine; both powers may concurrently exist. Nor is a pardon always adequate relief. An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power cannot do. To pardon is to exercise executive clemency; it is an act of mercy. An acquittal is the vindication of a right, the award of justice. Again, the executive may not feel warranted in turning a condemned criminal loose, and as he can grant no new trial, this he must do or deny a pardon. The Court need not discharge, but may put the accused again to trial. We cannot believe that the power to pardon was meant to cover every case of an unjust conviction, where the accused had, without fault on his part, not availed himself of the right of appeal."⁴⁸

The fact that a pardon may not infrequently be the only redress which is open to an innocent man operates not only as an injustice to the innocent, but, as has been said, probably exerts a retroactive influence towards the continuance of the notion that a pardon makes a convict into a man of good character. Thus, as a reason for his decision that in spite of an Act of Parliament providing that convicts should forever be disqualified from selling spirits at

⁴⁸ Sanders v. State, 85 Ind. 318, 322 (1882).

retail, a pardoned convict might be licensed to do so, Hawkins, J., said:

"To treat it [the pardon] otherwise would be contrary to what certainly must have been the intention of the legislature; for I cannot believe that it was the intention of the legislature that if a man had the great misfortune to be wrongly convicted, and was pardoned on the ground that the conviction was wrong, the Queen's pardon, although absolving him from the pains of imprisonment, should nevertheless leave him to suffer the penal effect of his conviction by being prevented, in future, from following his avocation, notwithstanding the rectification of the error which had occurred. It has been argued that the Queen's pardon may be granted for other reasons than innocence, — that a notorious thief may have received the Queen's pardon in consideration of his having informed and given evidence against his accomplices. I do not know how that may be. Perhaps if he had been convicted, and suffered part of his sentence, and shewn contrition, some remission of his sentence rather than a Queen's pardon would be granted."⁴⁹

A residence in South Carolina in recent years would perhaps convince one who shared the views of Hawkins, J., that sometimes in this country at least pardons are granted for other reasons than innocence.

It may be added that Hawkins' suggestion is at variance with the views expressed in the early books. A pardon "affirms the verdict and disaffirms it not."⁵⁰ A distinction in this respect was taken between an act of general pardon and a pardon of a particular offence. In the former case there was no presumption of guilt, but "the procuring of a special pardon doth presuppose, and it is a strong presumption that the party is guilty of the offence."⁵¹ In a recent decision the Supreme Court of the United States expressed the same view of the matter.⁵²

The doctrine that a pardon improves a man's character is the

⁴⁹ *Hay v. Justices*, 24 Q. B. D. 561, 567 (1890).

⁵⁰ *Searle v. Williams*, Hob. 288, 293 (1618).

⁵¹ *Sir Henry Fines' Case*, Godbolt 414 (1623).

⁵² In *Burdick v. United States*, 236 U. S. 79, 90 (1915), the court, upholding the right of one accused of crime to refuse to accept a pardon, said (without italics): "Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, — [the accused] preferring to be the victim of the law rather than its acknowledged transgressor — preferring death even to such certain infamy."

more objectionable because of the possible argument that a criminal who has served the sentence imposed upon him has expiated his crime, and is therefore in as good a position as if he had been pardoned. Indeed in England a statute expressly so provides.⁵³

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⁵³ See *Leyman v. Latimer*, 3 Ex. D. 15, 17 n. (1877). 9 GEO. IV, c. 32, § 3 recites: "Whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged," and enacts that one who has been "convicted of any felony not punishable with death, and hath endured . . . the punishment . . . adjudged . . . the punishment so endured . . . shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted."

REMOTENESS OF GENERAL POWERS

A GENERAL power of appointment exercisable only by will is void if the person to whom the power is given was unborn at the time when the instrument from which the power is derived took effect.¹ The reason is that nothing can vest in any one under an exercise of the power except upon an event that may happen beyond the limit allowed by the rule against perpetuities. The effect is the same as if the instrument had contained a gift to the person himself, dependent upon an event that could not be ascertained until his death.

But it has been said in recent text books that a general power exercisable by deed or will may be given to the unborn child of a living person, and that the power will be valid although it may not be exercised until after the legal period. This proposition was stated in Farwell on Powers in 1874 in this form:

"A power of appointment among children is well executed by an appointment to one of them for life, with power to dispose of the capital by deed or will, whether such children were *in esse* at the creation of the power or not; for this in effect gives the whole beneficial interest to the appointee, and does not transgress any rule against perpetuity."²

Mr. Marsden followed in 1882 with the statement that a "general power of appointment exercisable by deed or will may be limited to an unborn person, provided he is to be born within the legal period,"³ and Mr. Gray says that a general power given to the unborn child of a living person to appoint by deed is not obnoxious to the rule against perpetuities.⁴

The only authority that is cited in support of this proposition is *Bray v. Bree*,⁵ which was decided by the House of Lords in 1834.

¹ *Morgan v. Gronow*, L. R. 16 Eq. 1, 9-10 (1873); *Wollaston v. King*, L. R. 8 Eq. 165, 169-170 (1869); *Tredennick v. Tredennick*, [1900] 1 Ir. 354, 362.

² FARWELL, POWERS, 1 ed., 227, 257; 2 ed., 292, 322.

³ MARSDEN, PERPETUITIES, 236, 252.

⁴ GRAY, PERPETUITIES, §§ 477, 524.

⁵ 8 Bli. 568; 2 Cl. & F. 453; s. c. nom. *Bray v. Hammersley*, 3 Sim. 513, 518 (1830).

Mr. Gray mentions, however, in the first edition of his book, that the question of remoteness was not suggested in the case either from the bench or at the bar.⁶ Any authority that may be derived from the case must therefore rest on the assumption that the point was involved in the decision and must have received the consideration of the House of Lords. But an examination of the case will show that no such point was involved in it. It was not a case in which a mere *power*, in the ordinary sense of the word,⁷ was limited to an unborn child, but the entire beneficial interest in the property was given to the child, who was then a married woman, for her separate use, with the power of disposition incident to the separate estate of married women. No question of perpetuity could have arisen as to the time of her exercising her right to dispose of her own property.

Her interest was derived from her mother's marriage settlement, by which a fund of £8000 was settled upon trust, after the deaths of the husband and wife, for the children of the marriage in such shares, and with such conditions, restrictions, and limitations for their benefit, as the wife, if she survived her husband, should by deed or will appoint. The wife survived the husband, and, after the marriage of her daughter, who was the only child, appointed by deed that the trustees should stand possessed of the fund (subject only to her own life interest) as follows:⁸

"upon trust immediately after her decease . . . to pay, assign, and transfer the said trust monies and securities . . . in such manner and form as Sarah Eliza Bray [her daughter] . . . by any deed or deeds, or writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament . . . to be by her signed and published in the presence of two or more credible witnesses, should direct or appoint; *and in default* of such direction or appointment and in the mean time until any such direction or appointment should be made . . . upon trust during the life of the said S. E. B. to receive and pay, apply, and dispose of the interest and yearly income of the said trust monies and securities . . . into the proper hands of her the said S. E. B., or otherwise to permit her to receive and take the same to and for her sole and separate use . . . *and from and after the*

⁶ GRAY, PERPETUITIES, 1 ed., § 524.

⁷ See *Freme v. Clement*, 18 Ch. D. 499, 504 (1881).

⁸ 8 Bli. 569-570; 3 Sim. 516.

decease of the said S. E. B. should pay, transfer, and assign the said trust monies and securities . . . unto the executors or administrators of the said S. E. B. as part of her personal estate."

The daughter by her will, executed in the manner prescribed by the deed, gave the fund to her uncle. Her husband claimed it as her administrator, on the ground that the power in the marriage settlement was only a power of distribution and could not be exercised in the event of there being only one child, or, if it could, that it did not authorize an appointment to the daughter for her separate use or with a power of appointment, and that consequently the fund was vested in the daughter absolutely under the settlement, and (as she was a married woman) without any power of disposition by will.⁹

Sir E. Sugden, who supported the appointment, said that its effect was only to give in words what would have been implied in an appointment of the whole fund to the daughter for her separate use;¹⁰ and, if her mother had simply given her such an estate, it would have included the powers that she had by this more enlarged and more formal disposition, only it would not have been necessary to have any certain number of witnesses, and all this was for her benefit.¹¹ It was not suggested that any other effect should be given to the appointment, and the whole contest was whether it was authorized by the settlement. Lord Brougham said that the question raised was twofold, and that the principal question, and the only one incumbered with the least doubt, was whether the power was a power of appointing, in the event which

⁹ 8 Bli. 579-580, 587-588; 2 Cl. & F. 458, 459.

¹⁰ The daughter's life interest was expressed to be for her separate use, and the ultimate trust for her executors or administrators was a gift to the daughter herself, as they would take it as a part of her estate. *Attorney-General v. Malkin*, 2 Ph. 64, 66, 68 (1846); *Webb v. Sadler*, L. R. 8 Ch. 419, 427 (1873). This was an absolute gift of the fund to the daughter, which vested in her mother's lifetime upon the execution of the deed of appointment. The trust for her separate use for life gave her power to dispose of her life interest, but not of her reversionary interest. *Hanchett v. Briscoe*, 22 Beav. 496, 502-504 (1856); *Whittle v. Henning*, 2 Ph. 731, 734 (1848). And the power to dispose of the fund by deed or will put her in the same position as to the whole fund as if it had been limited to her for her separate use. *London Chartered Bank v. Lempière*, L. R. 4 P. C. 572, 595 (1873).

¹¹ 8 Bli. 594-596, 606. This part of the argument is not reported in 2 Cl. & F. 459-460. The opposing counsel were Sir C. Pepys (then Solicitor-General, and eighteen months afterwards Lord Chancellor as Lord Cottenham) and also Mr. Preston and Mr. W. Russell.

occurred, to one child, or only a power of distribution, and the other, on which he had no doubt, was whether the power was well executed.¹² Both questions were decided against the husband. As an absolute interest in the whole fund was thus vested in the daughter in her mother's lifetime, with all the incidents to which it would have been subject if the daughter had not been married,¹³ the case did not involve the question of remoteness that would have arisen if the appointment had been to the daughter for life for her separate use, with a general power of appointing the fund by deed or will, and, in default of appointment, the fund had been limited to other persons.¹⁴

Lord St. Leonards in his books refers to this case only as showing a form of appointment that may be made under a power to appoint among children with restrictions and limitations for their benefit.¹⁵ He does not anywhere suggest that a general power of appointment could have been given to the daughter without the ultimate limitation to her executors or administrators. He does however intimate the contrary, in discussing another subject, by the reasons he gives for his opinion that, when a person has a power to appoint to whomsoever he pleases, he may in point of perpetuity create the same estates as he might if he were the absolute owner. He takes the case of an owner of an estate in fee simple limiting the land to the use of such persons and for such estates as he himself should appoint, and in the mean time to the use of another person in fee, and says that, as regards the person who takes until appointment, no perpetuity is created *beyond the life of the donee* of the power, and when the power is executed, it is immaterial to him what estates are created, for, in whatever manner the fee is disposed of, his estate is defeated.¹⁶ The donee in this example is

¹² 8 Bli. 614-615, 618, 619; 2 Cl. & F. 462-463, 467.

¹³ Tullett v. Armstrong, 1 Beav. 1, 21-22 (1838); London Chartered Bank v. Lempière, L. R. 4 P. C. 572, 591 (1873).

¹⁴ The case was followed in Fry v. Capper, Kay 163, 170 (1853), and *In re Teague's Settlement*, L. R. 10 Eq. 564 (1870), where there were similar limitations with like ultimate gifts. In *In re Meredith's Trusts*, 3 Ch. D. 757, 760 (1876), where there was an appointment under a marriage settlement for a daughter for life, and after her death for such persons as she should appoint by deed or will, and in default of appointment for her children, the validity of the daughter's power was questioned, but was afterwards admitted, and there was no decision on the point.

¹⁵ SUGDEN, PROPERTY, 490-491; SUGDEN, POWERS, 8 ed., 416, 683.

¹⁶ SUGDEN, POWERS, 394-396.

a person living at the creation of the power, and the intimation is plain that, if the power of defeating the estate had not been confined to the legal period of time from the creation of the power, it would not have been valid.

The proposition that a power can be given to a person to dispose of property otherwise vested in other persons at a time more than twenty-one years beyond the duration of lives in being at the creation of the power is thus without the supposed sanction of the House of Lords. The case of *London & South Western Ry. Co. v. Gomm*¹⁷ is a direct authority that such a power would not be valid. There, in a conveyance by an incorporated company, the grantee had covenanted that he, his heirs and assigns, at any time thereafter, upon a six months' notice in writing from the company and upon receiving from them £100, would execute a reconveyance of the land. The company claimed specific performance of this covenant against a person who had purchased the land from the heir of the grantee with notice of the covenant, and it was held that, as the covenant gave an interest in the land and was unlimited in point of time, it clearly was bad as extending beyond the period allowed by the rule as to remoteness, and could not be enforced against the purchaser. It was said by Jessel, M. R., that the right to call for a conveyance was an equitable interest in the land; that the person exercising the option had to do two things, he had to give notice of his intention and to pay the purchase money; and as regards remoteness there was no distinction between one kind of equitable interest and another; in all cases they must take effect against the owner of the land within a prescribed period. It seemed to him impossible to suggest any real distinction between the case of a limitation to A. in fee, with a proviso that, whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs, and a contract that, whenever such notice is given and such payment made, A. shall convey to B. and his heirs. There was in each case the same fetter on the estate and on the owners of the estate for all time. Sir J. Hannen cited the passage from Sanders,¹⁸ "a perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening

¹⁷ 20 Ch. D. 562, 580-582, 586 (1882). See also *Winsor v. Mills*, 157 Mass. 362, 366, 32 N. E. 352, 353 (1892).

¹⁸ SANDERS, USES & TRUSTS, 5 ed., 204.

the fee-simple of the property discharged of such future use or estate, before the event is determined," and added that "this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases."

The same rule is applicable when property is limited under a marriage settlement upon trust for such persons as a child of the marriage shall appoint by deed or will, and meanwhile and in default of appointment upon trust for the child for life. Until an appointment is made, the property will vest in the child for life and after his death in the persons entitled under the settlement in default of appointment. It is in effect limited to the child for life and after his death to certain specified persons, with a proviso that, when the child gives notice (by deed or will) of his desire that it shall go to other persons, then it shall go to them accordingly. The right and control of the child is dependent upon his giving the notice or making the appointment. As this may be done at any time during his life, it is plain that nothing could vest in him or in any one by an exercise of the power until a time that might be long after the legal limit. In the mean time the persons entitled in default of appointment would be restrained from aliening the property discharged from the possible future use. The property would thus be tied up during all that interval in the mode which Mr. Gray says that it was the purpose of the rule against perpetuities to prevent.¹⁹ It would be tied up, until the exercise of the general power, in the same manner and to the same extent as it would be tied up by a special power to appoint by deed or will among particular objects, and such a special power is void if by its terms it may be exercised at a time beyond the legal period.²⁰

A reason that has been given for treating a general power to appoint by deed or will as valid, although it be given to a person not born when the power was created, is that it gives him in effect the whole beneficial interest, or makes him practically the owner.²¹ But whatever interest it gives him is dependent upon his exercising

¹⁹ GRAY, PERPETUITIES, § 268.

²⁰ *In re De Sommers*, [1912] 2 Ch. 622, 630; *Kennedy v. Kennedy*, [1914] A. C. 215, 220; MARSDEN, PERPETUITIES, 239; GRAY, PERPETUITIES, §§ 473, 474; 30 L. QUART. REV. 72 (Jan., 1914).

²¹ FARWELL, POWERS, 2 ed., 292, 322, *supra*, p. 664; GRAY, PERPETUITIES, § 477, appx., 3 ed., §§ 950, 962.

the power. A general power to appoint only by will also gives the donee an interest in the same sense. This is shown by *Phipson v. Turner*,²² in which it was held that, under a power to appoint among children, an interest for life might be given to a daughter for her separate use, with a general power of appointment by will, for this was, "in fact, giving her an interest, though it is a more limited mode of giving her the property," and "during her own life she had an interest in the fund for her separate use, and she also had in herself that testamentary power which she might have exercised in the same manner as if she had been plenary owner of the fund in question." This was approved in *Slark v. Dakyns*,²³ in which the circumstances were similar. In these cases, however, the daughter, to whom the power to appoint by will was given, was born in the lifetime of the testator from whose will the power was derived. But in *Morgan v. Gronow*,²⁴ where a like power of appointment by will had been given under a marriage settlement to a daughter of the marriage, Lord Selborne held that the power was invalid, "inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time which might be beyond the limits allowed by the rule as to perpetuities." And he added, "It is the same as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time." So, if the power authorized an appointment by deed or will, nothing could vest in her or any one else under an exercise of the power except at a time which might be beyond the legal limit, for she would have her whole life in which she might exercise the power, and the time of her doing so would be as uncertain as that of death itself.

In *Gomm's Case*,²⁵ the right to call for a conveyance which gave the railway company an equitable interest in the land was held to be void for remoteness, because it might have been exercised at any time during the company's existence. The vesting of any interest under an exercise of a power to appoint by deed or will

²² 9 Sim. 227, 245, 250-251 (1838).

²³ L. R. 10 Ch. 35, 40 (1874).

²⁴ L. R. 16 Eq. 1, 9-10 (1873); approving *Wollaston v. King*, L. R. 8 Eq. 165, 169-170 (1869).

²⁵ 20 Ch. D. 562 (1882), *supra*, p. 668.

depends in like manner upon the doing of the act prescribed in the power. As Mr. Gray expresses it, "the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised; if the power can be exercised beyond the required limits, the condition precedent may be fulfilled beyond the limits, and therefore the interest appointed under the power will be too remote." Afterwards, in speaking of the estates that may be appointed under a power exercisable by deed, he says that whether the power is given to an unborn or to a living person, "such a power is not really a power at all, but is a direct limitation in fee."²⁶ This cannot mean, however, that the power gives an estate in fee unless it is exercised, and if the vesting of the estate is dependent on the exercise of the power, it is difficult to understand how such a power can be given to an unborn person unless he is in some way restricted to the legal period in exercising it.

In Davidson's *Conveyancing*²⁷ it is said, in a note, that "the writer conceives that until *Wollaston v. King*²⁸ was decided, the appointment there in question would have been considered by the profession to be within the authority of the prior cases, and to be protected by the principle on which those cases were founded, namely, that the general power of appointment (whether exercisable by deed or will, or by will only) is in substance part of the interest limited to the object of the special power." It was right to consider the general power as part of the interest limited to the object of the special power, where it was given to a living person, as in *Phipson v. Turner*,²⁹ and must therefore be exercised, if at all, within the legal limit. But it must have been overlooked that nothing would come of the interest unless the power were exercised, and that, if it were given to an unborn person, nothing could vest in any one under an exercise of the power until a time that might be beyond the legal limit. When it was decided in *Wollaston v. King* and *Morgan v. Gronow*³⁰ that a general power of appointment by will was void in such circumstances for that reason, it ought to have been recognized that a general power of appoint-

²⁶ GRAY, *PERPETUITIES*, 3 ed., appx. §§ 959, 962; cf. § 950.

²⁷ 3 DAVIDSON, *CONVEYANCING*, 3 ed., 157.

²⁸ L. R. 8 Eq. 165, 169-170 (1869).

²⁹ 9 Sim. 227, 245, 250-251 (1838).

³⁰ L. R. 16 Eq. 1, 9-10 (1873).

ment by deed or will would also be void in the like circumstances for the same reason.³¹

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³¹ In a recent Canadian case, *Re Phillips*, 28 Ont. L. Rep. 94 (1913), a strange confusion was made in the application of the rule laid down in *Wollaston v. King* and *Morgan v. Gronow*. The testator, who died in 1910, gave his residuary estate in trust for his wife during her life or until her second marriage, and, after her death or marriage, in trust for his children then alive in equal shares, the issue of any then deceased child standing in its parent's place, with directions to pay to each of them the income of his or her share, and on the death of each to pay over his or her share *as such child or grandchild should by will appoint*, and in default of appointment to the persons entitled to his or her personal estate by statute in case of intestacy. He left surviving him a wife and seven children, all of whom seem to have been still alive. It is plain that, if a grandchild born after the testator's death should become entitled to a share, the limitation of his share to objects to be ascertained by his will or otherwise at his death would be too remote, and accordingly the power would be void as to such grandchild, and the judge so held, quoting (p. 97) the passage in *Halsbury's Laws of England*, vol. 22, p. 355. But he went on to say that the opposite view was taken in *Farwell on Powers*, 2 ed., 287, although in fact that book expresses exactly the same view (at p. 292) as the quotation from Lord Halsbury's book, and the passage at p. 287 relates to an entirely different subject, viz., the time from which the legal period runs in the case of an appointment under a general power to appoint by will, where the power is valid. He also thought he struck "a discordant note" in *Rous v. Jackson*, 29 Ch. D. 521 (1885) and *In re Flower*, 55 L. J. Ch. 200 (1885), but those cases also relate only to this latter question, and Lord Halsbury's book at p. 356 states the law exactly in accordance with them and with *Farwell on Powers*. It is clear, however, that, although the power of appointment would be invalid in the case of an afterborn grandchild, this did not affect its validity as to the shares of any of the children or of grandchildren living at the testator's death, for all the shares will be ascertained at the wife's death, or marriage, and the power applies to each of them separately, according to all the cases from *Griffith v. Pownall*, 13 Sim. 393 (1843), to *In re Russell*, [1895] 2 Ch. 698. The law is stated in Lord Halsbury's book at p. 346, and is the same here (*Hills v. Simonds*, 125 Mass. 536 (1878); *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412 (1888)). But the judge somehow got the impression from *In re Bence*, [1891] 3 Ch. 242, that the clause containing the power could not be split up, and accordingly held that the power and the alternative limitation were entirely void, and that the shares of the children and grandchildren must go to them absolutely under the original gift.

THE EFFECT OF WAR ON THE OPERATION OF
STATUTES OF LIMITATION

“THE Effect of War on the Running of the Statute of Limitations” might be deemed a proper topic of international law or of municipal law. It deals with the effect of war, an international relation, upon the operation of a municipal statute. Like many matters treated by writers on international law it combines international and municipal law, and the rules controlling are constantly spoken of as rules of each. The decisions, as will be seen, involve questions of tort, contract, and property right.

The English courts have ruled, as Sir Robert Phillimore states,¹ “that the Statute of Limitations (21 Jac. I., c. 16, § 7) is no bar to a party, whether he be a subject of the realm or a foreigner, who was not in England at the time the cause of action occurred, and who continues resident abroad.” This rule has perhaps tended to prevent the question of the effect of foreign war on the running of the Statute of Limitations being litigated in the courts of England, but not as concerned her civil wars.

Thus in *Hall v. Wybourn*² the court says (of the Statute of Limitations):

“In one *Bynton*’s case, it was held by Bridgman, C. J., that though the courts of justice were shut up so as no original could be filed, yet this statute would bar the action because the statute is general, and must work upon all cases which are not exempted by the exception.”

And in *Prideaux v. Webber*³ the defendant pleaded the Statute of Limitations to an action of trespass for assault and battery and imprisonment. The plaintiff replying “that certain rebels had usurped the government and that none of the King’s Courts were open,” it was adjudged for the defendant. “And the reason they gave that the Statute of Limitations was a good bar, (be it so, as it was pleaded, that the Courts were not open) was, because there

¹ 4 COMMENTARIES ON INTERNATIONAL LAW, p. 723.

² 2 Salk. 420 (1689).

³ 1 Levinz 31 (1661).

is not any exception in the act of such a case." This case is one sounding in tort.

In *Lee v. Rogers*,⁴ the court says:

"And in Hillary term the 15th of Car. II, in the Common Pleas, between Sir George Bremion and Sir John Evelyn, on a promise made in 1646, the defendant pleaded the Statute of Limitations; to which the plaintiff replied, that the defendant was a member of the House of Commons till 1648, and that then the government was usurped, and no courts erect; and that he brought his action as soon as the courts were erected by the King's restoration. And on demurrer it was adjudged, (as I heard) . . . Thirdly, That privilege of Parliament, nor the courts not being open, are not any excuse against the Statute of Limitations not being excepted out of the Statute."

Here the rule is decided as to an action on contract.

The stop to the running of the statute in these cases, which was claimed but denied, is due to the fact that the courts were closed, not to the fact that parties were divided by the line of war.

The whole subject was reviewed and the doctrine that the running of the statute was not hindered by a state of war was affirmed in *Beckford v. Wade*.⁵ Sir William Grant, M. R., there discussing the subject, says (p. 93):

"A very strong case is put, that of the Courts of Justice being shut up in time of war, so that no original could be sued out; and yet it has been given as the opinion of learned Judges, that even in that case the Statute would continue to run. In the case of *Hall v. Wybourn* (2 Salk. 420) and *Aubry v. Fortesque* (10 Mod. 206) it is stated to have been held by Bridgman, Chief Justice, that though the Courts of Justice were shut up, so as no original could be filed, yet this statute would bar the action; because the statute is general and must work upon all cases, which are not exempt by the exception; and in 10th Modern this resolution is said to have been often approved by Lord Chief Justice Holt."⁶

⁴ 1 Levinz 111 (1663).

⁵ 17 Ves. Jr. 87 (1810).

⁶ In the modern case of *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352, the Court of Appeal held that the Statute of Limitations did not run in favor of His Excellency Musurus Pacha, Turkish Ambassador, while he was accredited as such to the sovereign of Great Britain, or during such reasonable time thereafter as he was detained by closing his business and preparing to leave England. In this case the narrower rule of the older cases, that no exception can be introduced into the statute except as therein stated, however reasonable, seems not to have controlled.

This passage is by way of argument and *dictum*.

In the United States the matter seems to have been much more extensively considered and adjudicated than in Great Britain, both as to the effect of the closing of the courts during war and the effect of the separation of the parties by the line of war.

To begin with the earliest case observed, in — *v. Lewis*,⁷ the United States Circuit Court in 1805 decided that the Statute of Limitations was suspended during the continuance of the war as to alien enemies disqualified to sue in our courts. This rule is applied to a British adherent. No reference is made to our treaty with Great Britain, which might well have governed the case. This seems the beginning of a rule differing from that of the English courts.

Shortly after the war of 1812 between Great Britain and the United States the question came before the Constitutional Court of South Carolina, in *Wall v. Robson*.⁸ This was a case of summary process on a bill drawn by Nesbit in favor of Robson (the plaintiff), a British subject, on Wall, an American citizen, residing in Charleston and accepted by him. The bill was dated March 2, 1812, payable at thirty days on sight, accepted on the 25th of April following, and protested for non-payment May 28, 1812. On June 18, 1812, war was declared by the United States against Great Britain and continued two years, six months, and six days. If this period were excluded, the Statute of Limitations had not run. The trial judge held it should be so excluded. This was affirmed by the Constitutional Court of South Carolina in an extended opinion by Mr. Justice Bay. He shows that war does not deprive an individual in an enemy's country of his rights, but merely suspends them. That there is no default on the part of creditors who cannot enforce a claim in case of war, and that law will not penalize such enforced delay. It will be observed that this was an action on a contract. This case seems to announce fully the rule that has been ever since generally adhered to in the United States. It turned, however, on the separation of the parties by the line of war and the inability of an alien enemy to sue, not on the closing of the courts.

Many cases involving the principle arose, as was to be expected, at the close of the war with the Southern Confederacy. The people of the United States had been divided by a great civil war lasting

⁷ 1 Brunner, Col. Cas. 27, 15 Fed. Cas., No. 8,315 (1805).

⁸ 2 N. & McC. (S. C.) 498 (1820).

for years, severing many millions of countrymen between whom the most extended and intimate commercial relations existed. Intercourse across the line of war was forbidden and became penal. The federal courts were closed in Confederate territory. Rules derived from each of these circumstances were invoked to prevent the running of the Statute of Limitations and the accrual of interest upon obligations whose performance was thus frustrated by no fault of the parties thereto. The writer contributed to the *Law Quarterly Review* of London for July, 1909, an article of nineteen pages, in which it is believed to have been shown that the rule was overwhelmingly settled in the United States that interest did not run during such period as the parties to an obligation were separated by the line of war. The United States cases seem to be equally explicit to like effect that the Statute of Limitations ceases to run when the parties to an obligation are separated by the line of war, or when the courts to which they must apply are unable to sit in consequence of war.

In *Jackson Ins. Co. v. Stewart*⁹ the action was on a bill of exchange drawn in Tennessee in 1861 on a drawee in Maryland. It was held that the Statute of Limitations did not run during the period in which war was flagrant between the states mentioned. Speaking of the suspension of the right to sue, the court says (p. 312):

"This suspension, being by the exercise of the paramount authority of the government, cannot be held to work a forfeiture of the plaintiff's cause of action, but his right to sue, suspended by the war, revived when it ceased."

The opinion cites no authorities.

Perhaps the most complete and authoritative case in the United States upon the subject is *Hanger v. Abbott*.¹⁰ Abbott of New Hampshire sued Hanger of Arkansas in *assumpsit*. The question was whether the time while the courts of Arkansas were closed by the rebellion was to be excluded in computing the time fixed for limitation of action by the Arkansas statute, there being no exception or exemption stated in the statute. Mr. Justice Clifford gave the opinion of the court.

⁹ 1 Hughes 310, 13 Fed. Cas., No. 7,152 (1866).

¹⁰ 6 Wall. (U. S.) 532; Scott's Cases on International Law, p. 500 (1867).

His reasoning is that debts existing prior to war (between enemies) are not annulled, but the remedy merely is suspended as a necessary result of the inability of an alien enemy to sue in courts; that though the Statute of James the First enumerated specific exceptions which did not include the one under discussion, the omission was due to the fact that debts due alien enemies were confiscated for more than a century after that statute was enacted, and therefore law-makers, regarding such debts as annulled by war, never thought of making provision for their collection on the restoration of peace. The court regarded the old English decisions¹¹ as of little weight, even if correctly reported, on the ground that they were made before the rule of international law was acknowledged, that war only suspends debts due an enemy, and that peace had the effect to restore the remedy. It was held, accordingly, that the Statute of Limitations did not run while the creditor was incapable of suing, owing to the state of war. The inability to sue seems to rest both on the closing of the courts and suspension of intercourse.

The doctrine of *Hanger v. Abbott* has been followed in a series of interesting cases. The first of these is *The Protector*,¹² where the time of the beginning and termination of the War of the Rebellion as to acts of limitation was held to be determined by public acts of the political department. The Proclamation of Blockade by the President as to certain states was held to determine the commencement as to such states, and the Proclamation of Termination as to certain states by the President to determine the close as to such states. Alabama was named in the first Proclamation of Blockade and the first Proclamation of Termination of War. An appeal, filed May 17, 1871, from a decree of April 5, 1861, of a United States Circuit Court for Alabama to the Supreme Court at Washington was dismissed, more than five years having elapsed between the date of the decree and the appeal, after subtracting the time when the war was flagrant. The opinion of Chief Justice Chase is brief and unsatisfactory, but evidently applies the broad principle that the Statute of Limitations cannot run when a state of war prevents the doing of the acts necessary to prevent its running.

¹¹ *Hall v. Wybourn*, 2 Salk. 420 (1689); *Prideaux v. Webber*, 1 Levinz 31 (1661); *Lee v. Rogers*, 1 Levinz 111 (1663).

¹² 12 Wall. (U. S.) 700 (1871).

Shortly thereafter, in *Semmes v. Hartford Insurance Co.*,¹³ the Supreme Court decided that though the rule was established that a Statute of Limitations ceased to run when war prevented the doing of the acts required to stay its running, yet the rule was wholly otherwise where, under an insurance policy, certain acts were required by its terms within twelve months after loss. The war having frustrated the acts at the time specified, the stipulation therefore was held a condition from which the plaintiff was relieved by the war making performance impossible. The plaintiff was therefore wholly relieved therefrom and not bound to do the acts within a twelvemonth after peace, the general Statutes of Limitations being the only limits left. The opinion is by Mr. Justice Miller, considered as able as any member of the bench at that time or since.

The third case is *Brown v. Hiatts*.¹⁴ This was a bill of foreclosure. The mortgage was given in Northern territory and secured on Northern land (in the State of Kansas) to Brown, a resident of Virginia. After loaning the money and taking the security in Kansas, Brown returned to Virginia and there remained in territory declared to be in insurrection. It was claimed the action was barred by a Statute of Limitations of Kansas. Mr. Justice Field, holding that the statute did not run, in the course of his opinion said (p. 184):

"Statutes of Limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of *Semmes v. Hartford Insurance Co.* (13 Wall. 160), 'The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.'"¹⁵

It will be observed that the exclusion of the alien enemy from the court is the basis of the decision.

The rule was settled that an alien enemy might be sued even

¹³ 13 Wall. (U. S.) 158 (1871).

¹⁴ 15 Wall. (U. S.) 177 (1872).

¹⁵ See also *Bird v. Bank*, 93 U. S. 96 (1876).

though he could not have a right to bring suit in the courts of the hostile nation. *McVeigh v. United States*.¹⁶ This was there held in a proceeding for forfeiture of property under an act of Congress directed against those aiding rebellion, and it was held that the owner of property sought to be condemned is entitled to appear and contest the charges, though, when proceedings were brought and his answer filed, a resident within the enemy's lines and an enemy. The court holds (p. 267) that the liability to be sued carries with it the right to use all the means and appliances of defence, quoting from Bacon's Abridgment (title Alien, D), "For as an alien may be sued at law and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery." In *University v. Finch*¹⁷ Mr. Justice Miller, pointing out the limitations of this decision, said (p. 110):

"That case laid down the proposition that when a citizen of a state adhering during that war to the national cause brought suit afterwards against a citizen residing during the war within the limits of an insurrectionary state, the period during which the plaintiff was prevented from suing by the state of hostilities should be deducted from the time necessary to bar the action under the Statute of Limitations. It decided nothing more than this. It did not decide that a similar rule was applicable in a suit brought by the latter against the former."

The doctrine thus seems well settled in American law that where the parties are divided by the lines of war the statute does not run. But where the parties are citizens of the same power, in which the courts are closed, the authorities do not display this unanimity. The later and prevailing decisions, however, hold that the Statute of Limitations is suspended even in suits between persons of the same power, where war has closed all lawful courts. Thus in *Adger v. Alston*,¹⁸ in a suit between citizens of South Carolina and Louisiana, both states adhering to the Confederacy, the statute was held not to run while war was flagrant.

*Batesville Institute v. Kauffman*¹⁹ applied the rule to prevent the running of the Statute of Limitations as to a judgment lien on real estate, where, owing to the war, judicial proceedings in the courts of the United States were suspended in the state where the land lay, the location of the parties not being considered.

¹⁶ 11 Wall. (U. S.) 259 (1870).

¹⁷ 18 Wall. (U. S.) 106 (1873).

¹⁸ 15 Wall. (U. S.) 555 (1872).

¹⁹ 18 Wall. (U. S.) 151 (1873).

And in *Ross v. Jones*²⁰ the court held that it had been repeatedly decided that during the Civil War the courts of the United States in the insurrectionary states were closed, and that the Statute of Limitations did not run against suitors having a right to sue in the federal courts. That therefore the rule "applied to suits between persons in different states of the late so-called Confederate States of America, as much as to suits between citizens of the North, which remained loyal, and citizens of the so-called Confederate States, with which they were at war."²¹

Turning to the decisions of the state courts, it will be observed that in general they support the federal authorities as to the cessation of the running of the Statute of Limitations during war.²²

The bearing of a factor of international law on the problem remains to be considered. By sub. h, article 23, of the Convention of The Hague of 1907, it is especially forbidden "To declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party." Thus a "hostile" is to be heard in the courts of his enemy if he can lawfully get there, and it has

²⁰ 22 Wall. (U. S.) 576 (1874).

²¹ See *Cross v. Sabin*, 13 Fed. 308 (1882).

²² Thus *Bennett v. Worthington*, 24 Ark. 487 (1866), cites, approves, and follows the rule of the early English cases above, except as it was modified by statute in Arkansas. But this view was shortly overruled and the federal decisions followed in *Metropolitan Bank v. Gordon*, 28 Ark. 115 (1872), and this later doctrine was adhered to in *Mayo v. Cartwright*, 30 Ark. 407 (1875). *Williamson v. McCrary*, 33 Ark. 470 (1878), applied like rules to a statute of non-claim.

In *Mixer v. Sibley*, 53 Ill. 61 (1869), the Supreme Court of Illinois decided that the rules above considered would not prevent the maintenance of an action *in rem* by a plaintiff domiciled in United States territory to enforce a claim against a debtor within the territory of the Confederacy, since such suit required no illegal or "*locomotive intercourse*" across the line of war.

In *Perkins v. Rogers*, 35 Ind. 124 (1871), the suspension of the statute was fully applied. A plaintiff in Louisiana bringing suit against a defendant in Indiana was held exempt from the operation of the Statute of Limitations, even though New Orleans (where he was domiciled) was for a part of the time occupied by federal troops, that not removing his incapacity to sue in a Northern state, he being still an enemy, whatever his personal sentiments.

Selden v. Preston, 11 Bush (Ky.) 191 (1874), a suit on an obligation for \$24,000, fully affirms and follows the federal rule as above, and holds that a state statute providing that the time when plaintiff is a citizen of a country at war with the United States is not to be computed as a part of the period limited for the commencement of the action, is "but a declaration of what the law was prior to the enactment of the statute and the exception existed as well without as with it."

For other decisions by state courts, see *WOOD, LIMITATIONS*, § 6.

been suggested²³ that this provision abolished rules like those we are discussing. It is submitted that the absolute and rigorous necessity of non-intercourse across the line of war and the rule of law therefor is in no way affected by the above Convention. It enlarges the rights only of hostiles lawfully within the territory of the other belligerent or possibly in neutral territory.²⁴

When the parties are separated by the line of war, therefore, the rule as to the Statute of Limitations not running must still apply. Access to the court by an enemy is not denied by the court, but prevented by the requirement of non-intercourse.

Mr. Phillipson in his careful monograph on "The Effect of War on Contracts," p. 74 (London, 1909), cites the rule in the United States, and says that a contrary opinion is expressed by English writers, citing Anson on Contracts, p. 120, Lindley, vol. 1, p. 53, Pollock on Contracts, p. 92. These are names of high authority, but Mr. Phillipson adds:

"The only English case relating to this matter is *De Wahl v. Braune* (25 L. J. N. S. Ex. 343), where a married woman, whose husband was a domiciled enemy in Russia, claimed a right to sue for debt as a *feme sole*, on the ground that on his return he would be barred by the Statute. Lord Bramwell held that 'the inconvenient operation of the Statute of Limitations is no answer and does not take the case out of the general rule.'"

Mr. Phillipson adds:

"This is only an *obiter dictum* and it is conceived that the American doctrine, which is more reasonable and more conformable to justice and fairness, would now be followed in England."

It must be added that there seems some error in the reference by Mr. Phillipson to the three eminent English law writers as holding a contrary opinion. They have been consulted, and no such adverse opinion found as he indicates.

It is submitted that the authorities seem to establish that the Statute of Limitations will not run:

1. When parties are so divided by the line of war that the plaintiff cannot have access to the court.

²³ See BORDWELL, LAW OF WAR, p. 210.

²⁴ See as to the latter, *Tucker v. Watson*, 6 AM. L. REG. N. S. 220 (1866), holding as to interest that it did not accrue even where the enemy was in neutral territory.

2. When the court to which the plaintiff has a right to have recourse does not sit on account of the disorder of war.

It is submitted that the later rule announced in the courts of the United States is founded on reason and justice, and is consonant with the development of international law as to private rights and contracts, its tendency being to protect and preserve them if possible, only suspending the exercise of any rights, while war is flagrant, which are in their exercise incompatible with the necessities of the situation.

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THE COST OF SERVICE AND CONFISCATORY RATES. — Railroad operations present a peculiarly complex application of the economic law of increasing returns,¹ for not only is the initial capital outlay in permanent plant very great in comparison with operating costs, but also from one-half to two-thirds of the expenses of maintenance and operation are relatively constant and impervious to variations in the volume of traffic.² Under such conditions it is obvious that up to the capacity of the plant every additional unit of traffic is always worth while, provided only that it affords any return, however small, over and above the actual

¹ Peculiarly complex because they present also the problem of a plant which turns out not one homogeneous commodity, but many kinds of commodities, a part of the cost of which is incurred separately for each, and a part jointly for all. In such undertakings, although generally no commodity will be sold for less than the separate cost incurred in regard to it, the price at which any particular commodity will be sold, over and above this separate out-of-pocket cost, depends not upon any mathematical apportionment of the joint cost of producing all the commodities, but upon the character and extent of the demand for the particular commodity. See MILL, *PRINCIPLES OF POLITICAL ECONOMY*, Book III, ch. 16, § 1; article by Professor Taussig, 5 *QUART. J. of ECON.* 438-465.

² See RIPLEY, *RAILROADS, RATES AND REGULATION*, pp. 44 *et seq.*; ACWORTH, *ELEMENTS OF RAILWAY ECONOMICS*, pp. 5-50; article by Professor Taussig, 5 *QUART. J. of ECON.* 438-465; NOYES, *AMERICAN RAILROAD RATES*, pp. 10-17. For the purposes of this note "operating expenses" are meant to include not only the cost of moving the traffic but charges for maintenance of plant, depreciation, taxes, and all other fixed charges except interest on capital and dividends. "Out-of-pocket costs" include only the actual additional expenses incurred in moving any particular unit of service, exclusive of any share of fixed charges or permanent expenditure.

out-of-pocket expense of moving it.³ It is equally obvious that there are certain classes of traffic which would not move at all at rates under which they were made to bear their exact mathematical proportion of the burden of operating the entire enterprise.⁴ Yet if they can be attracted at any rate in excess of the actual expense of moving them, the income of the railroad is increased and the burdens of other classes of traffic are correspondingly relieved.⁵ This has been the accepted theory and practice of railroad rates since the beginning of our railroad history.⁶

The mere existence of this law by no means justifies all the practices to which it has led,⁷ but in two recent decisions the United States Supreme Court seems to have given it much less weight than it deserves.⁸ *Norfolk & Western Ry. Co. v. Conley*, Sup. Ct. Official, No. 197; *Northern Pacific Ry. Co. v. North Dakota*, Sup. Ct. Official, Nos. 420, 421. In the first of these cases a West Virginia statute fixing a maximum rate for the transportation of passengers within the state, and in the other a North Dakota statute establishing maximum rates for the intrastate transportation of coal in car-load lots, were held unconstitutional. In each of these cases the rates established were shown to yield a return in excess of the actual out-of-pocket cost of moving the traffic and closely approximating the share of total operating expenses chargeable to the service in question, but contributing little or nothing above this to the profits of the company.

There are two separate and distinct questions involved in the governmental regulation of railroad rates.⁹ The first is a question of policy for the rate-making authority alone, as to what is the most just basis upon which to establish rates. Upon this question there has been a considerable conflict of opinion, with the present tendency toward a more exact apportionment of rates according to the proportional share of total

³ See RIPLEY, RAILROADS, RATES AND REGULATION, pp. 71 *et seq.*; ACWORTH, ELEMENTS OF RAILWAY ECONOMICS, pp. 51 *et seq.*; HADLEY, RAILROAD TRANSPORTATION, pp. 109 *et seq.*; article by Professor Taussig, 5 QUART. J. OF ECON. 438-465; NOYES, AMERICAN RAILROAD RATES, p. 19.

⁴ See RIPLEY, RAILROADS, RATES AND REGULATION, pp. 169 *et seq.*; STROMBECK, FREIGHT CLASSIFICATION, pp. 9-34.

⁵ See n. 3, *supra*. This does not necessarily apply to all public services. See Railroad Commission of Louisiana *v. Cumberland T. & T. Co.*, 212 U. S. 414, 426.

⁶ See RIPLEY, RAILROADS, RATES AND REGULATION, chs. 4, 5.

⁷ Personal discriminations and discriminations between localities are generally attributable to this desire of the railroad to attract traffic and build up a demand for its services. For an interesting instance see Railroad Commission of Nevada *v. Southern Pacific Co.*, 21 I. C. C. 329.

⁸ For a more complete statement of the facts in these cases see this issue of the REVIEW, p. 716. For the report of the North Dakota case in the state court, see *State ex rel. McCue v. Northern Pacific Ry. Co.*, 26 N. D. 438, 145 N. W. 135. And for the same case on a previous appeal see *State ex rel. McCue v. Northern Pacific Ry. Co.*, 17 N. D. 223, 116 N. W. 92; *Northern Pacific Ry. Co. v. North Dakota*, 216 U. S. 579.

⁹ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1120; 4 ELLIOTT, RAILROADS, § 1684 *b*; *Louisville & Nashville R. Co. v. Siler*, 186 Fed. 176, 189; *Detroit & M. R. Co. v. Michigan Railroad Commission*, 203 Fed. 864, 870. For this very reason cases in which the court is considering the reasonableness of a rate in the first instance or under statutory power to review the reasonableness of a rate fixed by a commission are to be carefully distinguished from cases in which only the constitutionality of a rate is in issue. See *Gulf Central & S. F. R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 116 S. W. 795; *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission of Louisiana*, 127 La. 636, 53 So. 890.

operating costs attributable to the respective services.¹⁰ Under present industrial conditions this may be a wise and beneficial policy, but a scrutiny of the various accounting methods used in apportioning the total costs of operation demonstrates that any fair and exact apportionment is a mathematical mirage. At best it can be but an experienced guess, based on arbitrary ratios and percentages.¹¹ Moreover, such strait-jacket methods are opposed to the economic nature and growth of American traffic as shown by the practice of the railroads,¹² and had they been adopted at the beginning of our railroad history, the industrial development of the country would have been seriously impeded.¹³

But the Supreme Court had no occasion in the principal cases to consider the relative justice of these different rate-making policies.¹⁴ The sole question before them was the narrow one of constitutional law: whether these specific rates prescribed by legislative authority constituted a taking of property without due process of law, or a denial of the equal protection of the laws under the Fourteenth Amendment. Upon this question it might be a convenient rule of procedure to hold that proof that a rate does not yield a return commensurate with its allocated share of operating costs rebuts the presumption of its constitutionality and shifts the burden upon the state of showing special circumstances to justify the rate,¹⁵ were it not for the inherent weakness of the proof itself. It is not in accord with constitutional practice to permit the strong presumption of constitutionality in favor of a legislative act¹⁶ to be overthrown by such an arbitrary mathematical division of the economically inseparable costs of production. Moreover, it can scarcely be contended that that which has been the established practice of railroad rate-makers for three-quarters of a century is not due process of law when practised by legislative rate-makers.¹⁷ There are, of course, limits beyond which the

¹⁰ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1190, 1201, 1202, 1227, 1228; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission of Louisiana, 127 La. 636, 53 So. 890.

¹¹ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1193-1196; NOYES, AMERICAN RAILROAD RATES, pp. 17-19, 39. Modern methods of accounting have made possible a comparatively exact distribution of the separate costs incurred with respect to each particular class of service, but the joint costs, such as taxes, overhead expenses, and maintenance charges, which are incurred with practically no relation to the volume of any particular class of traffic, must be apportioned arbitrarily. The methods of apportionment are as various as the cases themselves. Cf. *In re Arkansas R. Rates*, 163 Fed. 141; *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. 317; *Missouri, K. & T. Ry. Co. v. Love*, 177 Fed. 493; *In re Passenger Rates, Minneapolis, St. P. & S. S. M. R. Co.*, 1 Wis. R. Comm. 540, 556, 567; *The Minnesota Rate Cases*, 230 U. S. 352, 436 *et seq.*

¹² See RIPLEY, RAILROADS, RATES AND REGULATIONS, chs. 4, 5.

¹³ See NOYES, AMERICAN RAILROAD RATES, p. 42; RIPLEY, RAILROADS, RATES AND REGULATION, pp. 169 *et seq.*; MEYER, GOVERNMENT REGULATION OF RAILWAY RATES, pp. 86-92.

¹⁴ See *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167, 173; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 470, 478; *Intermountain Rate Cases*, 234 U. S. 476, 488.

¹⁵ See *Northern Pacific Ry. Co. v. North Dakota*, Supreme Court Official, Nos. 420, 421, p. 9.

¹⁶ See *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167, 173; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 264; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41.

¹⁷ Cf. dissenting opinion of Baker, J., in *Chicago, R. I. & P. Ry. Co. v. Interstate Commerce Commission*, 171 Fed. 680, 692; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 267; *Intermountain Rate Cases*, 234 U. S. 476, 486.

regulation of rates by the state cannot be carried. In general, a railroad is entitled to earn from its entire business a reasonable return upon the fair value of its capital investment, and any reduction which deprives it of such a return is confiscatory.¹⁸ Moreover, the state's power to regulate rates is confined to the business of the carrier within its limits, and any reduction of charges upon that business which throws a disproportionate burden upon the business conducted in other states or in interstate commerce is unconstitutional.¹⁹ And it may well be that a railroad cannot be compelled to transport a particular class of traffic at a rate which does not cover the actual out-of-pocket cost of moving it, since obviously such traffic can contribute nothing to the road's income.²⁰ Finally, gross inequalities in the rates for different kinds of traffic moving under substantially similar economic conditions may well be interdicted as discriminatory.²¹ But the mere fact that each separate class of service does not yield a return exactly equal to its arbitrarily guessed proportionate share of total operating costs does not necessarily indicate that the charge for such service is confiscatory or discriminatory.²² It has never been thought that a railroad was entitled to earn a fair return from "every mile, section, or other part into which the road might be divided,"²³ nor that every additional facility which it might be required to furnish should show a fair net profit to the company,²⁴ and the court itself concedes in the principal cases that the rates need not be uniform for all commodities so as to secure the same percentage of profit on every class of business.²⁵ The principal cases will no doubt settle the law contrary to the views here expressed;²⁶ and in the particular instances before the court the result is perhaps not regrettable, but if every rate fixed by the regulating authorities is to be subjected to this rigid test a serious

¹⁸ *Coke & Coal Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Smyth v. Ames*, 169 U. S. 466; *The Minnesota Rate Cases*, 230 U. S. 352.

¹⁹ *Smyth v. Ames*, 169 U. S. 466.

²⁰ *Chicago, St. P. M. & O. Ry. Co. v. Becker*, 35 Fed. 883. But see *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1; *Gulf Central & S. F. R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 354, 116 S. W. 795, 796. In the exercise of the police power the state may doubtless compel the rendering of certain services at a loss. See *Interstate Consolidated St. Ry. Co. v. Massachusetts*, 207 U. S. 79, 86.

²¹ *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684. See 14 COL. L. REV. 442. But it is doubtful whether the company could object to the rates on the ground that they were discriminatory. See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 54; *Tucker v. Missouri Pacific Ry. Co.*, 82 Kan. 222, 225, 108 Pac. 89, 90; *Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 109.

²² *Puget Sound Elec. Ry. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 739. See *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 267. But see 25 HARV. L. REV. 276.

²³ *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649; *Chesapeake & O. Ry. Co. v. Public Service Commission*, 83 S. E. (W. Va.) 286. See 13 MICH. L. REV. 407.

²⁴ *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262; *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 152 Wis. 654, 140 N. W. 296. But see *Yazoo & M. V. R. Co. v. Railroad Commission of Louisiana*, 130 La. 1012, 58 So. 862.

²⁵ *Northern Pacific Ry. Co. v. North Dakota*, Supreme Court Official, Nos. 420, 421, p. 9.

²⁶ A previous Note in the REVIEW, accepting for better or worse the current trend of rate-regulating authority, predicted this very fate of economic law at the hands of the courts. See 25 HARV. L. REV. 276.

obstacle has been opposed to an intelligent adjustment of charges according to economic conditions.

MAY A CRIMINAL PENALTY BE SHIFTED? — Whether one upon whom a criminal penalty has been imposed for an act of his own regarded as criminal, may shift the burden of his fine by a civil action against another primarily responsible was squarely presented by a recent English case. *R. Leslie (Ltd.) v. Reliable Advertising and Addressing Agency (Ltd.)*, [1915] 1 K. B. 652.¹ The plaintiffs, moneylenders, had been fined for the statutory misdemeanor of sending circulars to an infant,² because the defendant agency in addressing envelopes had, contrary to its contract, negligently included a minor's name. The moneylenders were allowed only nominal damages, it being considered contrary to the public interest that one so sentenced should not bear both his fine and costs. The question decided seems never to have arisen in this country. English authority is not abundant, but the question was discussed by way of *dicta* in two cases. The first, in 1834, took the view, in a suit against the managing editor of a newspaper by the proprietor who on his account had been fined for libel, that there was no right of compensation for an injury of this character.³ The second, at a much later date,⁴ attempted to introduce a qualification to this general rule against shifting a penalty. In this case a trooper brought an action of deceit for personal injuries sustained while innocently participating at the defendant's solicitation in the Jameson Raid in violation of the Foreign Enlistment Act.⁵ Neither criminal prosecution nor fine was involved, but one judge was of opinion that no public policy precluded one who had been convicted of a crime of which *mens rea* was not an element from receiving full indemnity.⁶ Prior to the principal case, this suggested exception does not seem to have been questioned, for in two subsequent cases persons convicted of the minor statutory misdemeanor of selling impure meat or fish succeeded in recovering the amount of their fines against their vendors on warranty without the legality being questioned.⁷

This dividing line of the English decisions allowing recovery over of fines only in the case of lesser crimes, at first sight seems analogous to the distinction in the law of torts as to contribution between tortfeasors. Although as a rule there is said to be no right of contribution, it is now somewhat generally established that there may be a legal adjustment of the loss unless the wrong was conscious, intentional, or immoral.⁸

¹ A statement of the case appears in this issue of the REVIEW, p. 705.

² BETTING AND LOANS (INFANTS) ACT, 1892 (55 & 56 Vict., ch. 4), § 2. MONEY-LENDERS ACT, 1900 (63 & 64 Vict., ch. 51), § 5.

³ *Colburn v. Patmore*, 4 Tyrw. 677, 1 C. M. & R. 73. The case was decided, however, on a point in pleading. Cf. *Poplett v. Stockdale*, 1 R. & M. 337 (1825), in which Best, C. J., said, "It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law."

⁴ *Burrows v. Rhodes*, [1899] 1 Q. B. 816; see 13 HARV. L. REV. 215, 226.

⁵ 1870 (33 & 34 Vict., ch. 90), § 11.

⁶ See *Burrows v. Rhodes*, *supra*, 831, per Kennedy, J.

⁷ *Crage v. Fry*, 67 J. P. 240; *Cointat v. Myham*, [1913] 2 K. B. 220.

⁸ See 12 HARV. L. REV. 176, containing an explanation of the leading case of *Merryweather v. Nixan*, 8 T. R. 186.

The purpose of the general rule, which recognizes that the denial of contribution may, as among the tortfeasors, result in unfairness, is to create a deterrent upon this sort of conduct.⁹ Thus, for intentional conversion,¹⁰ defamation,¹¹ or knowingly maintaining a danger,¹² one jointly responsible cannot apportion his loss. But there may be contribution where there has been an unintentional conversion,¹³ or where one has been held responsible owing to some legal doctrine, such as partnership,¹⁴ *respondeat superior*,¹⁵ or the virtual suretyship of a municipal corporation for the safe condition of the streets.¹⁶

The principal case would seem more nearly to resemble the latter classification, where according to the later English cases involving crimes, as in the law of tortfeasors, the burden may be passed along or divided. The plaintiffs were innocent, in fact, and *mens rea* was not an element of the misdemeanor.¹⁷ Had the plaintiff been injured through loss of trade or in some such other collateral way on account of his conviction, there would therefore have been no objection to recovery. The only damages claimed, however, were the fine and costs, and these the court on account of the policy of the criminal law refused to recognize. Such a conclusion, involving as it does a rejection of the later English exception permitting the shifting of criminal penalties in the case of the lesser crimes, seems proper. There being a strong policy against minors receiving money-lenders' advertisements at all, the object of the legislature would be better effectuated by leaving the results of criminal liability where they fall. If the plaintiff could shift the pecuniary loss to the defendant, an additional safeguard against this evil would be simultaneously destroyed, for the incentive to each moneylender to see to it personally that none of his circulars reached minors would be lessened. Of course, it is possible that a subcontractor or agent might likewise have violated the statute, and have been fined himself. To shift the principal's fine to him also, however, would merely serve to accumulate the deterrents of criminal and civil liability upon one person presumably of less responsibility. Without regard to justice among the parties, the rule to prevail should be the one most likely to prevent the occurrence of the acts the statute intended to obviate. This policy of the criminal law would seem to require that a

⁹ See *Thweatt v. Jones*, Adm'r, 1 Rand. (Va.) 328, 333.

¹⁰ *Peck v. Ellis*, 2 Johns. Ch. (N. Y.) 131; *Boyd v. Gill*, 19 Fed. 145; *Davis v. Gilham*, 44 Oh. St. 69; *Boyer v. Bolender*, 129 Pa. 324.

¹¹ *Arnold v. Clifford*, 2 Sumn. (U. S.) 238; *Atkins v. Johnson*, 43 Vt. 78. Libel stands on peculiar grounds for historical reasons, it being conclusively regarded as knowingly committed. See *Kennedy, J.*, in *Burrows v. Rhodes*, *supra*, p. 833, referring to *Colburn v. Patmore*, *supra*: "The plaintiff though actually ignorant was legally cognizant of the publication of the libel."

¹² *Spaulding v. Oakes*, 42 Vt. 343.

¹³ *Adamson v. Jarvis*, 4 Bing. 66; *Thweatt v. Jones*, Adm'r, *supra*; *Acheson v. Miller*, 2 Oh. St. 203.

¹⁴ *Wooley v. Batte*, 2 C. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504; *Horbach v. Elder*, 18 Pa. 33.

¹⁵ *Bailey v. Bussing*, 28 Conn. 455.

¹⁶ *Lowell v. Boston & Lowell R.*, 23 Pick. (Mass.) 24; *Westfield v. Mayo*, 122 Mass. 100; *cf. Armstrong County v. Clarion County*, 66 Pa. 218. See 28 HARV. L. REV. 636.

¹⁷ The fact that nominal damages were allowed in the principal case corroborates this view. The opinion of the court in claiming this was a crime involving *mens rea* seems to have been an unsuccessful attempt to reconcile the result desired with the previous English test.

punishment, whether in the form of fine or imprisonment, should always remain fixed with him upon whom it was imposed.¹⁸ The ordinary test of the law as to contribution or indemnity in the case of other elements of damage is inapposite to criminal penalties, because of the stronger policy of repression in the latter.

POSSIBLE INTERESTS IN ONE'S NAME OR PICTURE. — "The law is utilitarian. It exists for the realization of the reasonable needs of the community."¹ So it is not surprising that with the advent of modern photography and the growth of a certain type of unscrupulous journalism the law has come to recognize to a limited extent an individual's right of privacy, a right not to have his personal affairs subjected to public comment and scrutiny without his consent.² Yet the courts have handled the matter very unsatisfactorily.³ A recent case in New York evidences the confusion of thought which pervades the entire subject. The plaintiff secured from an actress the exclusive right to the use of her picture on posterettes. The defendant thereafter with the consent of the actress published and sold posterettes bearing the same picture. The court refused an injunction on the ground that the statutory right of privacy was a purely personal right, and therefore not subject to assignment.⁴ *Pekas Co. v. Leslie*, 52 N. Y. L. J. 1864 (N. Y. Sup. Ct.).

¹⁸ If, in a particular statute, it is not intended to preclude the adjudication of justice between the parties, a clause may be inserted declaring that any fine imposed under its provisions may be recovered in damages. See the English SALE OF FOOD AND DRUGS ACT (1875), § 78. In the absence of such a clause, it should be presumed that no such recovery over was intended.

¹ Ames, "Law and Morals," 22 HARV. L. REV. 110.

² *Pavesich v. N. Eng. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364; *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849; *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076; *Edison v. Edison Polyform, etc. Co.*, 73 N. J. Eq. 136, 67 Atl. 392; *Warren and Brandeis*, "The Right to Privacy," 4 HARV. L. REV. 193; WIGMORE, SUMMARY OF THE PRINCIPLES OF TORTS, § 148; COOLEY, TORTS, 3 ed., p. 364. In some states the right has been expressly recognized by statute. NEW YORK CONSOL. LAW, ch. 6, §§ 50, 51; CAL. PENAL CODE, § 258. It can be waived by consent or voluntary submission to public scrutiny. *Corliss v. Walker*, 64 Fed. 280. See *Pavesich v. N. Eng. Life Ins. Co.*, 122 Ga. 190, 199, 50 S. E. 68, 72. And it must give way if in conflict with the freedom of the press. *Moser v. Press Pub. Co.*, 59 N. Y. Misc. 78, 109 N. Y. Supp. 963. See *Pavesich v. N. Eng. Life Ins. Co.*, 122 Ga. 190, 204, 50 S. E. 68, 74.

³ The right of privacy, whether recognized or not, is generally considered a personal right. Relief granted: *Pavesich v. N. Eng. Life Ins. Co.*, *supra*; *Foster-Milburn Co. v. Cherin*, *supra*; *Douglas v. Stokes*, *supra*. Relief refused: *Roberson v. Rochester Box Co.*, 171 N. Y. 538, 64 N. E. 442; *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97. But a few courts grant relief on the ground of the violation of a right of property analogous to one's right in the products of his mind, such as unpublished letters, sketches, etc. *Munden v. Harris*, *supra*. *Edison v. Edison Polyform, etc. Co.*, *supra*. And there is some judicial expression to the effect that both a personal right and a property right are involved. See the dissenting opinion of Gray, J., in *Roberson v. Rochester Box Co.*, 171 N. Y. 538, 561, 564; also *Colt, J.*, in *Corliss v. Walker*, *supra*, p. 282.

⁴ NEW YORK CONSOL. LAWS, ch. 6, § 51, provides: "Any person whose name, portrait, or picture is used for advertising purposes or for purposes of trade without written consent first obtained . . . may maintain an equitable action to prevent and restrain

Individual interests are not created by the law. They exist by virtue of the demands which each individual may make as a member of society in so far as such are not outweighed by the like demands of others. Only in so far as the law recognizes these interests are legal rights created.⁵ From this standpoint, and considered solely apart from the question of legal rights, an unauthorized publication of one's name or picture may involve at least three distinct interests. First, there may be the interest that his mental peace and comfort be not disturbed by dragging him before the public. This is obviously an interest of personality, and must be recognized if at all as a personal right of privacy.⁶ Secondly, there may be the interest in reputation — that he be not held up to hatred, contempt, or ridicule. If infringed, an action for libel will lie, although an interest in privacy may also be involved.⁷ Thirdly, there may be an interest in property. Herein lies the confusion. Generally, one's interest that his name or picture be not published broadcast is an interest of personality. But if the owner has treated it as of pecuniary value, or if by virtue of his profession or business it has become such, privacy ceases to be the dominant element, for there is now the distinct interest of substance that no one interfere with that name or picture to detract from its value. A celebrated artist's name is as much a part of his property as the picture he paints, for it gives added value to his productions. Again, if an actress uses her picture as an advertisement, it becomes for her a valuable asset which the law should recognize as property. But the interest of a sensitive girl is far otherwise. She is strongly opposed to publicity. A surreptitious use of her photograph causes her no pecuniary loss whatsoever, but only mental distress. To the actress, however, publicity is the very thing desired. It is another's unauthorized interference with a *pecuniary* interest which she complains of. And just as the interests are distinct, so the rights securing them are distinct.⁸ Whether the interest, and consequently the right, is one of substance or of personality must be considered from the

the use thereof, and may also recover damages. . . ." The statute is construed as creating a personal right of privacy. *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097; *Riddle v. MacFadden*, 201 N. Y. 215, 94 N. E. 644.

⁵ Pound, "Interests of Personality," 28 HARV. L. REV. 343.

⁶ *Ibid.*, p. 362. Relief may be had by an injunction as well as an action for damages, for the better view is that the restraining power of equity extends over personal as well as property rights. *Pierce v. Swan Point Cemetery Proprietors*, 10 R. I. 227.

⁷ *Peck v. Tribune Co.*, 214 U. S. 185. See *Munden v. Harris*, 153 Mo. App. 652, 662, 134 S. W. 1076, 1080.

⁸ This distinction is clearly recognized in the Civil Law. BAUDRY-LACANTINERIE, *PRÉCIS DE DROIT CIVIL*, Vol. 1, §§ 116, 119; ENNECERUS, *LEHRBUCH DES BÜRGERLICHEN RECHTS*, Band 1, *Ableitung* 1, § 93, (9) NAME. But there is some conflict in the common law. The English doctrine seems to be that the owner must have actually used his name (or picture) in a commercial way, or relief will be refused. *Dockrell v. Dougall*, 78 L. T. 840. See *Clark v. Freeman*, 11 Beav. 112, 119. The better view would seem to be that if one's name had become an asset through reputation the law should protect it as such although not actually put to a business use. *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. C. 402, 18 N. Y. Supp. 240. In *Edison v. Edison Polyform, etc. Co.*, *supra*, the court based its decision on the broad ground that every private individual has a property right in his name or picture. There was no doubt a property right involved under the particular facts, for the interest of a famous inventor in his picture is clearly one of substance.

standpoint of the individual injured.⁹ The difficulty arises in determining which interest is involved in a given set of facts.

Moreover, it would seem that these two rights are exclusive. The use of one's name or picture as property from necessity presupposes publicity to lend it pecuniary value. Again, the very essence of reputation is publicity, so if one's name acquires value through reputation, the interest in privacy is sacrificed. One cannot use his name publicly to any considerable extent and keep it private at the same time. Conversely, if the interest in privacy as such is infringed, no property right in the name or picture can exist. No doubt the unauthorized use by another, although infringing an interest of substance, may cause mental anguish as well as pecuniary loss, as where a reputable physician uses his name on a bottle of medicine and another steals it for advertising some quack remedy. Yet the right violated is still a property right. Reparation for the added mental suffering may be made by giving parasitic damages,¹⁰ but, strictly speaking, no interest in privacy is infringed. The public use of the name refutes any such interest.

In the principal case, the actress treated her picture as property. She consented to its use for a public purpose, and thereby waived any interest in privacy. Consequently, no right of privacy under the statute was involved. But the court should have protected the assignment as a right of property.¹¹

RECOVERY FOR GOODS SOLD BY AN ILLEGAL COMBINATION. — Once more the United States Supreme Court has had presented to it the question whether a combination violating the Sherman Anti-Trust Act may recover for goods sold on a contract legal in itself but a part of a scheme to perpetuate the monopoly. *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165. The defendant alleged that the plaintiff, an illegal combination, in order to continue its monopoly, had perfected a profit-sharing scheme, which punished the failure to deal with the plaintiff exclusively in any given year by the forfeiture of a rebate on previous purchases. It was also alleged that every contract provided that the goods were not for resale. The court held that these allegations constituted no defense.

Since persons are not ousted from law courts merely because they are

⁹ This is well illustrated in the case of *Ellis v. Hurst*, 66 N. Y. Misc. 235, 121 N. Y. Supp. 438. The plaintiff, well known as an author under a *nom de plume* which he always assumed, sought an injunction to restrain the defendant from surreptitiously using his true name in connection with an unauthorized publication of the plaintiff's works. No objection was made to the publication of the books themselves. The court rightly granted relief under the New York statute as a violation of the right of privacy. Clearly an interest of personality was alone infringed. But had the plaintiff written under his true name, its unauthorized use would have violated a property right similar in nature to his right in the books themselves.

¹⁰ Cf. 27 HARV. L. REV. 87.

¹¹ The New York statutory right of privacy would seem broader than the common-law right. If the actress had not consented to the use of her picture by the defendant, on the wording of the statute she still had a cause of action against him for using her name for advertising purposes without her written consent, although her interest in privacy was gone.

law breakers, it is now clear that the mere fact that the plaintiff is a monopoly does not bar its recovery.¹ On the other hand, if the very contract in suit is illegal it plainly cannot be enforced.² The situation in the principal case falls between these two elementary propositions. The contract was intrinsically legal;³ but when taken together with other contracts, it did no doubt tend to further the continued existence of the monopoly. This relation the court refused to consider. Substantially the same facts have come before the Supreme Court twice before. In the first case, however, the court managed to find no tendency in the contract sued on to perpetuate the monopoly.⁴ But in the second, where the connection between the contract and the illegal combination was perhaps more clear, a divided court recognized it and decided for the defendant.⁵ In material facts it is difficult to distinguish this case from the principal case,⁶ and it is therefore overruled in substance, or at least limited to its very facts in that the contract there sued on might possibly have been of itself illegal.⁷

As a matter of contract law, it is a question of some difficulty to determine whether a contract intrinsically legal is tainted with illegality because it is part of a monopolistic scheme. It is obvious that these unoffending contracts, sufficiently duplicated, may be the very foundation of monopoly. This is recognized when the public attacks a combination directly,⁸ and although in a private suit on the separate contract the public interest is not quite so closely affected, yet the weight of authority here also considers it unenforceable because of its unlawful tendency.⁹

The only justification, therefore, for the result in the principal case must be that the Anti-Trust Law cuts off all search into the illegality of monopolies other than by the methods it prescribes. Such a doctrine would be highly desirable. It would relieve plaintiffs of the troublesome necessity of establishing their innocence to the satisfaction of any and every court which chanced to have jurisdiction, and leave the conclusive decision of important and complicated "trust" questions once and for

¹ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. See 22 HARV. L. REV. 435.

² *Patterson v. Imperial Window Glass Co.*, 91 Kan. 201, 137 Pac. 955.

³ *Fuller v. Hope*, 163 Pa. St. 62, 29 Atl. 779; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981. Perhaps such a contract would now be illegal. See CLAYTON ANTI-TRUST ACT, § 3 (approved Oct. 15, 1914).

⁴ *Connolly v. Union Sewer Pipe Co.*, *supra*.

⁵ *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227; 22 HARV. L. REV. 435.

⁶ See *International Harvester Co. v. Oliver*, 192 Fed. 59, 66.

⁷ The court in the principal case distinguished the *Continental Case* on this ground. The dissenting justices in the *Continental Case* pointed out, however, that the contract was *per se* intrinsically legal.

⁸ See *Swift & Co. v. United States*, 196 U. S. 375, 396.

⁹ *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 128 S. W. 599; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36; *Santa Clara Val. M. & L. Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Judd v. Harrington*, 19 N. Y. Supp. 406; *Brent v. Gay*, 149 Ky. 615, 149 S. W. 915. Cf. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 186; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102. See 22 HARV. L. REV. 435. *Contra*, *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723; *Carter-Crume Co. v. Peurrung*, 86 Fed. 439. See also the dissenting opinion of Mr. Justice Holmes in *Continental Wall Paper Co. v. Voight & Sons Co.*, *supra*.

all to the federal courts.¹⁰ The Act provides three remedies: dissolution or a criminal prosecution by the government, a forfeiture of property, and an action for threefold damages by any person injured.¹¹ The last does appear inconsistent with an intention to vest the exclusive right to deal with violations of the Act in the government. Yet here, too, jurisdiction is vested solely in the federal courts;¹² and although one conclusive determination as to the legality of a combination for all purposes is not provided for, at least neither state nor federal courts are affirmatively given jurisdiction to attack monopolies collaterally by refusing to enforce contracts furthering their purposes. The contention that the Act goes further and deprives the courts of the right of such collateral attack is powerfully supported by an analogy in the interpretation of the Act to Regulate Commerce.¹³ This, likewise, gives any person the right to sue for damages in any district or circuit court.¹⁴ And it further provides that all existing remedies are preserved, the provisions of the Act being "in addition to such remedies."¹⁵ Yet, in order to prevent interference with what the Supreme Court considered a fundamental policy of the Act, namely, the maintenance of a uniform standard of rates, it construed the Act as depriving courts of their undoubted former jurisdiction to pass upon the reasonableness of rates, unless and until they had been found unreasonable by the Interstate Commerce Commission.¹⁶ Such an interpretation of the Sherman Law, which also has no express provision on the matter, may seem strained.¹⁷ But by means of it the courts are deprived of their otherwise undoubted right to refuse enforcement to contracts furthering illegal monopolies, and the desirable result of the principal case attained.¹⁸

EVIDENTIAL USE OF MATHEMATICALLY DETERMINED PROBABILITY. — A recent case in New York instancing methods of criminal detection reminiscent of Sherlock Holmes¹ also exhibits what is apparently a new problem in the law of expert evidence. *People v. Risley*, 214 N. Y. 75,

¹⁰ See the majority opinion when the principal case was before the Georgia Court of Appeals. *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 11 Ga. App. 588, 599, 75 S. E. 918, 923.

¹¹ 26 U. S. STAT. AT LARGE, 209, §§ 4, 6, 7.

¹² The recent amendment that the result of a government suit will be *prima facie* evidence in a suit by a private party is also significant. TRADE COMMISSION ACT OF OCT. 15, 1914, § 5.

¹³ 24 U. S. STAT. AT LARGE, 379.

¹⁴ *Ibid.* § 9.

¹⁵ *Ibid.* § 22.

¹⁶ *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

¹⁷ To be sure, in developing common-law principles the courts go slowly in order to avoid judicial legislation. See *Holmes, J.*, in *Stack v. New York, N. H. & H. R. Co.*, 177 Mass. 155, 158. But in applying a statute the courts may properly take stronger action in order to carry out the legislative intent. See *Lord Haldane* in *Trim District School Board v. Kelley* [1914] A. C. 667, 680. Cf. 28 HARV. L. REV. 308, n. 12.

¹⁸ A logical application of the analogy would seem also to subject the individual's right to sue for threefold damages to the condition precedent of an adjudication of the illegality of the monopoly in a direct attack by the Attorney-General.

¹ "A Case of Identity," by Sir Arthur Conan Doyle.

108 N. E. 200.² To show that a typewritten forgery had been done on the defendant's typewriter, experts on typewriters were called, who testified that certain peculiarities of the form and alignment of the type exhibited by the specimen in question corresponded exactly with peculiarities exhibited by writing from defendant's typewriter.³ An expert mathematician was next produced, who, in response to a hypothetical question ascribing certain ratios to the probable recurrence of any one defect, was allowed to testify that the probability of the coincidence of all these defects in another machine was one in four billion.⁴ The admission of the latter testimony was held to be reversible error on the narrow and doubtless unimpeachable ground that the assumed hypothesis was unwarranted by any evidence in the case, but the court indicated that such testimony is necessarily improper to establish a past event.⁵

An obvious, though unsound, objection to the admission of such evidence is that it is an opinion by a witness no more expert in the sort of phenomena under investigation — *viz.*, typewriters — than the jury; or, as it is sometimes said, that it amounts to an usurpation of the jury's function.⁶ Undoubtedly it is the function of the jury to pass judgment on the facts and determine the weight of inferences to be drawn. Reasoning by witnesses is not allowed unless it is of a sort which the jury is not equally well qualified to do for itself. But it is fundamental that one possessing special skill or knowledge, not open to all, concerning the sort of phenomena under investigation, and whose opinion will therefore be of assistance, will be permitted to express an opinion as to the probability of an occurrence;⁷ and it seems equally in accord with the spirit of the opinion rule to allow the same sort of testimony by one who, although without special knowledge of facts, is skilled in a specialized method of treating facts, provided his method is of value in judicial investigation.⁸

The only objection, if any, to the admission of expert evidence must therefore be that mathematically determined probability is of no use in judicial investigation. The probability of an event is not a quality of the event itself, but expresses a degree of uncertainty in our knowledge

² A statement of the case will be found in RECENT CASES, p. 708.

³ An instance of similar use of such evidence is found in *State v. Freshwater*, 30 Utah 442, 85 Pac. 447. See also *Levy v. Rust*, 49 Atl. 1017 (N. J.).

⁴ Similar testimony as to the chance of a given individual writing three signatures exactly alike was admitted in the celebrated Howland Will Case, an account of which will be found in 4 AM. L. REV. 625. The appeal was decided on other grounds and the correctness of this ruling not tested. See *Robinson v. Mandell*, 3 Cliff. (U. S.) 169.

⁵ Hogan, J.: "That rule [referring to expectancy tables] is used from necessity when the fact to be proved is the probability of the happening of a *future* event. It would not be allowed, for illustration, if the fact to be established were whether A had in fact died, to prove by the Carlisle table he should still be alive." 214 N. Y. 75, 86, 108 N. E. 200, 203.

Seabury, J. (dissenting on other grounds): ". . . I should hesitate to cast a vote which . . . would sanction the reception of such evidence as to past transactions." 214 N. Y. 75, 96, 108 N. E. 200, 206.

⁶ For a criticism of this phrase see 3 WIGMORE, EVIDENCE, § 1920.

⁷ See 3 WIGMORE, EVIDENCE, § 1976.

⁸ See 3 WIGMORE, EVIDENCE, § 1923, where it is said: "But the only true criterion is: On *this subject* can a jury from *this person* receive appreciable help."

concerning it.⁹ All events are certain in nature. Probability is thus an expression of the effect of more or less evidence in giving rise to belief. The use of the term in mathematical science is not different from its use in the affairs of everyday life, except that in everyday life probability takes into account evidence of all kinds, whereas mathematical probability can deal only with the convincing effect of a very limited kind of evidence. Probability is determined mathematically by taking the ratio of the number of possible cases in which given circumstances may combine to produce a given event, to the total number of possible cases in which the circumstances may conceivably combine in all ways, when nothing induces a belief that any particular case will occur rather than another.¹⁰ The ratio is thus a shorthand expression of the truth concerning a large series of events. The only truth expressed finally is as to the series as a whole,¹¹ without taking into account any special evidence as to any particular individual of the series.¹² Nevertheless, having evidence only as to the whole, with none as to particulars, the mathematical calculation affords the most accurate and rational method of measuring the proper effect of this evidence upon belief.

This proposition receives recognition in the law when it becomes necessary in estimating the amount of a recovery, the right to which is shown by more satisfactory evidence,¹³ to determine the future date at which an individual will die (or would have died but for the conduct of defendant). Here the facts of experience consist of statistics showing the ages to which a large number of individuals of the given age have been observed to live. Mathematics is applied to these statistics to give the probable expectancy, which is almost everywhere admitted as evidence.¹⁴ Now, as pointed out by a learned writer, it is not the futurity of an event which induces us to act upon such evidence, but the absence

⁹ See MILL, *SYSTEM OF LOGIC*, 3 ed., Bk. 3, ch. 18, § 1.

¹⁰ Cf. the definition by La Place in 22 *Encyclopædia Britannica*, 11 ed., tit. Probability, p. 377.

¹¹ The conception of mathematical theory of probability as dealing with a series of events rather than with particular individuals of a series is developed in VENN, *THE LOGIC OF CHANCE*, ch. 1, §§ 1-9.

¹² This accounts for the seeming paradox that many events which are determined by mathematics to be improbable (on the whole) are easily believed to have happened. Any evidence to prove that a particular individual belongs to a class occurring very infrequently in the series in no way contradicts a calculation which did not consider the particular evidence, and conversely the particular evidence is not weakened because of the calculation. Indeed, the only reason for making a calculation based on general data is the absence of more satisfactory data relative to the particular event. So when a mathematically improbable event is asserted to have happened, the entire basis of probability is shifted. The question becomes one of the probability of the individual's veracity and of the probable trustworthiness of his sources of information; or if an eyewitness, of the probable accuracy of his observation.

¹³ It will be noted that the evidence required to induce a court to give any judgment at all must show stronger probability than that required to fix the amount of such a judgment, once it is shown that a judgment should be given. This difference obviously rests solely on practical necessity. It is submitted that this fact is responsible for the apparent force of the example given by Hogan, J., in support of his argument (*supra*, n. 5). But it does not follow that evidence susceptible of mathematical treatment could never have sufficient weight to prove an issue requisite to recovery. *A fortiori* it does not follow that expert mathematical calculation upon such evidence should always have such small relevancy as to be inadmissible on such an issue.

¹⁴ See 3 WIGMORE, *EVIDENCE*, § 1698.

of other evidence of more convincing nature¹⁵ — a situation obviously more often, but not necessarily only, existing with regard to future events. Hence it is submitted that, given relevant evidence to which mathematical calculation is applicable, it should be equally admissible whether the *probandum* concerns the past or future.¹⁶ There may, of course, be cases where the evidentiary facts to be used as basis of calculation will have such slight relevancy that it will be useless to use them, and of course their mathematical expression will be equally excluded. There may also be cases in which general data, standing alone, indicate a strong probability, but in which there is sufficient evidence relative to the particular event in question to make the mathematical probability based only on general knowledge have almost no value. Here the calculation would be superfluous also, although the general data might be relevant to assist in a proper understanding of the more specific evidence under consideration. But these are questions of auxiliary policy dependent upon the facts of particular cases, and it is submitted that no general rule should exclude the mathematical calculation of probability in any case where the facts are susceptible of such treatment.

ENFORCEMENT OF TRADE — UNION RULES TO PUNISH AN OUTSIDE PARTY. — Frequent discussions have left the field of labor litigation bereft of virgin charm. A Rhode Island case, however, is worthy of note because of its liberal view. *Rhodes Bros. Co. v. Musicians' Protective Union Local, etc.*, 92 Atl. 641.¹ The court in that case dissolved an injunction which had issued against a musicians' union restraining it from imposing fines on any of its members to prevent them from playing for the plaintiff. The musicians had been ordered not to enter the plaintiff's employment under a by-law of the association which prohibited any member from playing for any person who the directors might decide had broken a contract with one of the union.

When a combination resorts to conscription of neutrals, complicated questions arise beyond the scope of the present discussion, but the right of a trade union to require its own members to comply with its own rules seems simply a consequence of recognizing such unions as lawful associations. Some courts, however, while not questioning the right to inflict the drastic penalty of expulsion, have held that an outside party is illegally injured when fines or threat of fines are used to promote united action against him.² This seems a decidedly strange result, for as in these jurisdictions the fines are uncollectable, a member could readily avoid

¹⁵ VENN, *THE LOGIC OF CHANCE*, ch. 5, § 5.

¹⁶ To draw an example similar to that given by the court. Suppose, in a case where the presumption of death does not apply, it is desired to prove the death of an individual who has disappeared. The fact that if alive he would now have reached the age of ninety-five would certainly be relevant. Would it not also be permissible to show the proportionate number of persons who, reaching the age of the given individual when last heard from, also reach the age of ninety-five?

¹ For a more complete statement of this case see *RECENT CASES*, p. 718.

² *L. D. Willcutt & Sons v. Driscoll*, 200 Mass. 110, 85 N. E. 897; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085 (traders' association); *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607 (traders' association). See 17 HARV. L. REV. 558, 20 *id.* 355, 22 *id.* 234.

them by submitting to expulsion.³ So he would have no cause to fear them unless he feared expulsion more. It is difficult to see why any court should bar as "coercive" the less coercive method of the two. Perhaps the reason is that less than a century ago labor unions were everywhere held illegal as combinations in restraint of trade;⁴ and although they are now generally said to be legal, some narrow limitations upon their activities may be due to an unconscious inclination to attach to them unjustly some of the stigma they formerly bore.⁵ A union's rules and by-laws should be contracts binding upon its members unless there is something in the nature of the particular rule to make it illegal besides conflict with obsolete economic theories.⁶ Looked at from this point of view a member in obeying the orders of the proper officers with regard to a matter in which he has agreed to place himself under their control is *primâ facie* not only doing no wrong, but is only doing his legal duty, and the officers are only doing their duty in enforcing his performance by the use of any reasonable means.⁷ And these may in proper cases extend to fine,⁸ expulsion,⁹ or the threat of either,¹⁰ without giving an outsider affected a right to complain. This should be equally true in jurisdictions holding that the fines are collectable and cannot be avoided by resignation from the union. The union member has voluntarily and legally submitted himself to the pressure, and made himself a member of the forces arrayed against the plaintiff.

The legality of the defendants' action then should depend solely upon the nature of the by-law that is being enforced, and the motive with which it is brought into operation against the plaintiff. Now the rule here invoked by the union would generally operate to punish the outside party for past acts more than to put pressure on him to do something in the future of pecuniary benefit to the association. Clearly rules thus punitive of outsiders should be sparingly recognized, and where they do not tend to benefit the union in any legitimate way or where the pre-

³ See *Martell v. White*, 185 Mass. 255, 261, 69 N. E. 1085, 1088; *Boutwell v. Marr*, 71 Vt. 1, 9, 42 Atl. 607, 609.

⁴ For the history of trade unions see *Hitchman Coal & Coke Co. v. Mitchell*, 202 Fed. 514-533; 25 HARV. L. REV. 465; ASSINDER, *TRADE UNIONS*, chs. i, iv.

⁵ Even in Australia, where an advanced stand has been taken, vestiges of the old common-law views of restraint of trade long obtained. See *Taffs v. Beaseley*, 16 Austr. L. T. 59 (association of traders). Of course on common-law principles there is no difference as regards legality between combinations of laborers and combinations of traders, although sometimes the former appear to be treated more severely. Cf. *Friendly Soc. v. Ingall*, 28 T. L. R. 104 (C. A.) with *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, [1892] A. C. 25.

⁶ *Master Stevedores Ass'n v. Walsh*, 2 Daly (N. Y.) 1; *Brown v. Stoerkel*, 74 Mich. 269, 41 N. W. 921; *Osborne v. Greymouth, etc. Union*, 30 New Zealand L. R. 634.

⁷ *Scott Stafford Opera House Co. v. Minneapolis Musicians' Ass'n*, 118 Minn. 410, 136 N. W. 1092; *Saulsbury v. Coopers' Int. Union*, 147 Ky. 170, 143 S. W. 1018. *Wabash R. Co. v. Hannahan*, 121 Fed. 563, especially at p. 571.

⁸ *Jetton-Deckle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590; *Rea v. Buckland*, 11 West Australia L. R. 2 (traders). See *Osborne v. Greymouth, etc. Union*, *supra*, at pp. 636, 637; *Amalgamated Soc. of Engineers v. Austr. Inst. of Marine Engineers*, 3 C. A. R. 97, 101 (Australia).

⁹ *Bonn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119. See *L. D. Willcutt & Sons v. Driscoll*, 200 Mass. 110, 124, 140, 85 N. E. 897, 903, 910.

¹⁰ Every enforcement of a rule involves at least a threat of disciplinary action, for otherwise there would be no enforcement but merely a voluntary cessation of work. Consequently the cases in n. 8 and n. 9, *supra*, stand for the legality of such threats.

dominating motive is vindictive,¹¹ it should be unlawful to enforce them. But it seems proper for an association to take concerted action¹² to inspire respect for contracts made with its members,¹³ so long at least as the action taken extends no farther than a peaceable refusal to allow its members to offer their services.¹⁴ The method used should not be illegal simply because it is indirect.¹⁵

Legal theory and criticism in this field have frequently fallen into the error of looking too much at the *plaintiff's* rights.¹⁶ The right of the individual to a free market for his capital or labor has been disproportionately developed, while insufficient emphasis has been placed upon the recognized facts that under modern conditions free competition means combination,¹⁷ that collective action by labor tends to fairer competition between capital and labor by putting the contracting units on more equal terms,¹⁸ and that our complex economic system often calls for devious means of protecting self-interest. The problems generally presented are so much more economic than legal that legislation sooner or later seems inevitable to relieve courts of general jurisdiction from the burden of trying to solve them,¹⁹ but it is none the less incumbent upon the courts not to take a narrow position in the meanwhile.

¹¹ *Quinn v. Leatham*, [1901] A. C. 490; *Miller v. Collet*, 32 New Zealand L. R. 994; *Martell v. Victorian Coal Miners' Ass'n*, 25 Australian L. T. 40, 120. (Contrary decision in the lower court adversely criticized in 17 HARV. L. REV. 140.) That the punishment in the above cases was inflicted specially and not within rules only makes the cases distinguishable on an additional ground. Departing from general tactics often attaches legal liability. See ASSINDER, *TRADE UNIONS*, 93. Thus the fact that the rule in *Martell v. White*, *supra*, n. 2, applied only to a single person goes far to distinguish that case. For a discussion of intent and motive in labor litigation see 20 HARV. L. REV. 256.

¹² As to the legal effect of combination see *Sweeney v. Coote*, [1906] 1 Ir. Ch. 51, 109; *Scott Stafford Opera Co. v. Minneapolis Musicians' Ass'n*, 118 Minn. 410, 414-415, 136 N. W. 1092, 1094.

¹³ *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224, 28 S. W. 504 (traders); *Brewster v. Miller's Sons Co.*, 101 Ky. 368, 41 S. W. 301 (traders). *Contra*, *Giblan v. Nat. etc. Union*, [1903] 2 K. B. 600; See 17 HARV. L. REV. 140.

¹⁴ It is, of course, illegal for the union thus to cause a breach of contract. *Lumley v. Gye*, 2 E. & B. 216; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239.

¹⁵ The by-law in the principal case would be less open to criticism if it provided for adjudication of disputes by parties more disinterested than the union directors. *Cf. Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457. But their decision appearing to have been rendered *bonâ fide* after the plaintiff was given a fair hearing, it hardly seems that the case should turn on that point.

¹⁶ See *Rea v. Buckland*, *supra*, at p. 8.

¹⁷ See dissent of Holmes, J., in *Vegelahn v. Gunter*, 167 Mass. 92, 107-108, 44 N. E. 1077, 1081. These views are still adhered to. See Holmes, J., in *Coppage v. Kansas*, 236 U. S. 1, 27.

¹⁸ There seems no immediate danger of over-correction. Even where unionism is particularly favored by law, experience has shown that the employer still largely controls the situation. See *Federated Engine Drivers', etc. Ass'n v. Broken Hill Proprietary Co.*, 5 C. A. R. (Australia) 9, 27.

¹⁹ There is much food for thought in the system the Australian Federal Government has evolved, although constitutional difficulties might be encountered in its adoption in this country. COMMONWEALTH CONCILIATION AND ARBITRATION ACT, 1904-1911. All interstate strikes or lockouts are criminal. §§ 4, 6. See *Ex parte Hart*, [1905-07] C. A. R. 107. A special court of Conciliation and Arbitration has been constituted which has power to initiate conferences and take jurisdiction of all industrial disputes and prevent and settle them. §§ 4, 16, 18. This includes the power to fix a scale of min-

TESTING THE RELIABILITY OF THE LAY HANDWRITING WITNESS. — Since the value of opinion evidence rests entirely upon the degree of accuracy which the witness's special skill or peculiar knowledge gives to his conclusions, and since juries tend to give undue credence to unsupported statements of opinion, no test should be forbidden which, by displaying the ability of the witness to deal with the problem under investigation, throws light upon the true value of his testimony. The untrustworthy nature of lay opinion evidence as to handwriting¹ makes this especially true in that case.² Yet a recent North Carolina decision holds that such a witness cannot be tested on cross-examination by being asked to pass upon the authenticity of specimen genuine and forged signatures, though their authorship be proved in a manner that would make authentic signatures admissible for the purpose of comparison in the direct examination. *Fourth National Bank of Fayetteville v. McArthur*, 84 S. E. 39.³

Such a result, from the layman's point of view, must no doubt seem a palpable error. The principle underlying all evidence as to handwriting is that all the signatures of any one individual display common distinguishing characteristics. Hence the estimation of the authenticity of specimen true and forged signatures of the reputed author displays specifically the ability of the lay witness to identify the signatures of that particular person, and thus provides an exceptionally accurate test of the merit of his opinion.⁴ In addition, this test is the only means whereby the value of his testimony can be satisfactorily determined; for with a lay witness who employs the principles of no science, recourse cannot be had either to professional reputation or an examination as to scientific understanding.⁵ Finally, as the judging of hand-

imum wages. § 40 (b). *Rural Workers' Union v. Maldura Branch, etc.* Ass'n, 6 C. A. R. 61. And to determine a great variety of the conditions of employment. *Merchant Service Guild v. Com. S. S. Owners' Ass'n*, 6 C. A. R. 6. In order to facilitate arbitration organization of labor is indispensable. See *Australian Tramway Employees Ass'n v. Prahran, etc.* Trust, 6 C. A. R. 130, 143. Accordingly, the act provides that neither employer nor employee may refuse to offer or accept employment because the other is a member of an organization. §§ 9, 10. And the court may decree that preference be given union men. § 40 (a). *Australian Tramway Employees Ass'n v. Prahran, etc.* Trust, *supra*. Under a similar New South Wales act it has been held that such preference will be decreed as a matter of course whenever the Association substantially represents the employees of an industry. *Trolley Draymen and Carriers Union v. Master Carriers Ass'n*, 4 N. S. W. A. R. 38.

¹ Generally lay witnesses who have seen the reputed author write, or whose business experience has acquainted them with his hand, are permitted to express their opinion as to the authenticity of the disputed signature. *Keith v. Lothrop*, 64 Mass. 453; *Hammond v. Varien*, 54 N. Y. 398; *Hammond's Case*, 2 Me. 33.

² See *Browning v. Gosnell*, 91 Ia. 448, 458, 59 N. W. 340, 344.

³ A statement of the facts of this case appears in RECENT CASES, p. 708.

⁴ Such an experiment is an equally thorough test of the merit of the expert witness. See *Hoag v. Wright*, 174 N. Y. 36, 43, 66 N. E. 579, 581. Rarely is a problem which so thoroughly tests the witness's ability to deal with the matter in hand, united with so infallible a basis for determining the correctness of his answer.

⁵ The only other possible way of estimating the lay witness's ability is on the basis of former instances of his skill. Even in the rare cases where such instances exist, such a basis has many objectionable features from which the court-room test is free. See 2 WIGMORE, EVIDENCE, § 1005 d. The situation as to the expert is almost identical. As the identification of handwriting is not recognized as a distinct profession, little can be learned from the professional reputation of the witness. An examina-

writing by such a witness requires neither lengthy processes nor any special apparatus,⁶ no practical obstacle exists to his making a satisfactory judgment in the court room. The discretion of the trial judge will insure that the test is fairly undergone, and that the witness is not forced to give decisions under conditions dissimilar from those under which his decision concerning the disputed signature was made. The not uncommon assertion that a non-expert witness "cannot be expected to withstand the ordeal of such examination,"⁷ by showing that such opinion evidence ordinarily has but little merit, only emphasizes the need for giving to the jury the one satisfactory means available for estimating its true value.

Although the desirability of this method of cross-examination is clear, it is necessary to see if its use is opposed to any of the devious legal technicalities concerning comparison of writings. As the test is not based on comparison by juxtaposition, but upon the identification of a signature by means of the mental image in the witness's mind, exactly as in the direct examination, no difficulty arises from the rule forbidding all comparison of signatures by a lay witness.⁸ To be sure, any further difficulties which might arise from the various rules restricting the introduction of extraneous specimen signatures could be avoided by limiting the specimens used to those proper for the purpose of the direct examination; but to confine the specimens used to these necessarily genuine signatures would be all but to destroy the efficacy of the test.⁹ In jurisdictions where any signatures are admissible for the purposes of the direct examination, if proved authentic by direct evidence to the satisfaction of the trial judge,¹⁰ no objection on principle can be raised to the utilization for impeachment of other signatures, forged as well as genuine, if the character of each is proved to the court. If the nature, true or false, of each specimen is known before the test, there can be no danger of collateral issues arising. The discretionary powers of the trial judge will be a sufficient guard against surprise or unfairness in the choice of specimens¹¹ — an unfairness which is unlikely anyway in the case of the false signatures, since the more carefully the forgeries are made

tion as to scientific understanding is of little avail, as the expert does not to any large extent apply the principles of any science but rather affords the jury the benefit of skilled observation.

⁶ The apparatus of the expert, even, consisting as it does essentially of microscopes and measuring instruments, is such as is perfectly capable of use in court.

⁷ See the principal case, p. 44; *Andrews v. Hayden's Adm'rs*, 88 Ky. 455, 459, 11 S. W. 428, 430.

⁸ *Garrels v. Alexander*, 4 Esp. 37; *Travis v. Brown*, 43 Pa. 9. *Contra*, *Vinton v. Peck*, 14 Mich. 287. And with the expert also, since his direct testimony is based on comparison, no objection on this score can arise to his being required to juxtapose the same standard signatures with test specimens on the cross-examination.

⁹ Counsel have made ingenious attempts to apply the test without proving the authorship of extraneous specimens, by endeavoring to secure disagreement among the opponent's witnesses or conflicting opinions from the same witness, concerning the authorship of a single signature; or by seeking to induce the witness to deny an admittedly authentic signature by interchanging it with unproven specimens. But as these tests depend for their success upon tricking the witness rather than causing him to undergo a searching examination, they are obviously unsatisfactory. See 3 WIGMORE, EVIDENCE, § 2015 (1).

¹⁰ *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Koons v. State*, 36 Oh. St. 195, 199.

¹¹ See *Hoag v. Wright*, 174 N. Y. 36, 43, 66 N. E. 579, 581.

the more thoroughly will they test the witness's ability to detect them.¹² Many jurisdictions, however, for fear of collateral issues or unfairness, arbitrarily restrict the admission of specimens on the direct examination to those admitted to be genuine or those already in the case.¹³ This rule of thumb, imperfect even for direct examination, cannot be meant to apply to cross-examination. Collateral issues would be avoided by the use of specimens admitted to be false as well as those admitted to be true, while the papers already in the case necessarily afford only genuine signatures. So, even in courts so limiting the juxtaposition of signatures on the direct examination, no insurmountable legal obstacle exists to the full use of this test of the witness.¹⁴

RECENT CASES

ABATEMENT AND REVIVAL — SURVIVAL OF ACTION — BREACH OF PROMISE OF MARRIAGE: SPECIAL DAMAGES. — In an action for breach of promise to marry, the plaintiff alleged as special damages that she gave up a business in which she was engaged, in consideration of the defendant's promise to marry her. Before the pleadings were delivered the defendant died. *Held*, that the action cannot be maintained against the executor. *Quirk v. Thomas*, 31 T. L. R. 237 (K. B.).

Lord Ellenborough's *dictum* that an action for breach of promise of marriage will survive against an executor if there are special damages has been widely repeated in the books. See *Chamberlain v. Williamson*, 2 M. & S. 408, 411; *Stebbins v. Palmer*, 18 Mass. 71, 75. But what special damages will suffice for

¹² Eccentric genuine signatures or genuine ones written especially for the occasion could be excluded here by the court as well as in direct examination.

¹³ The authorities on this point, which is largely governed by statute, are so diversified as to admit of no systematic classification. See 3 WIGMORE, EVIDENCE, §§ 2008, 2016, n. Three rules, however, may be taken as typical. (1) Comparison is not permissible. *Gibson v. Trowbridge Co.*, 96 Ala. 357, 11 So. 365; *Kinney v. Flynn*, 2 R. I. 319. (2) Only specimens admitted to be genuine or already otherwise in the case may be used for comparison. *Macomber v. Scott*, 10 Kan. 335; *Vinton v. Peck*, 14 Mich. 287. (3) Signatures are admissible for comparison if proved to the satisfaction of the trial judge. See n. 10, *supra*.

¹⁴ The authorities upon this point are extraordinarily confused. Though the case of the lay witness is in every respect more clear than that of the expert, it has been suggested that even where the test is allowed in the case of the expert, it cannot be applied to the lay witness. See *Wilmington Savings Bank v. Waste*, 76 Vt. 331, 336, 57 Atl. 241. But for the most part the question of whether the test is permissible is treated alike for both sorts of witnesses. See *Page v. Homans*, 14 Me. 478, 487; 3 WIGMORE, EVIDENCE, §§ 2014, 2015. In jurisdictions where extraneous specimens are provable for the purpose of the direct examination, the use of forged signatures in cross-examination has several times been allowed. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340. But see *Andrews v. Hayden's Adm'rs*, 88 Ky. 455, 11 S. W. 428. But in those jurisdictions which do not allow the proof of extraneous specimens for the purposes of the direct examination, the decisions do not permit the proof of such specimens for impeachment. *Gaunt v. Harkness*, 53 Kan. 405. However, some of the jurisdictions which forbid the proving of extraneous specimens for the purpose of the cross-examination permit the test if made exclusively with unproven signatures and those employed in the direct examination. *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429. Cf. *Howard v. Patrick*, 43 Mich. 121, 5 N. W. 84.

the purpose is much in doubt. It is clear that where in addition to the promise to marry there was a promise to give property to the plaintiff, breach of the latter promise will create a cause of action, which survives against the promisor's executor. See *Finley v. Chirney*, 20 Q. B. D. 494, 500. Perhaps this is what is meant by the common statement that the action will survive if the promise directly affects the plaintiff's property. See *Hovey v. Page*, 55 Me. 142, 145. Certainly pecuniary loss directly caused by the breach is not enough to make the action survive. *Finley v. Chirney*, *supra*. Indeed no case has been found in which a suit on a bare promise to marry survived the death of either party unless by force of a statute. *Shuler v. Millsaps*, 71 N. C. 297; *Stewart v. Lee*, 70 N. H. 181, 46 Atl. 31. The principal case strengthens the probability that the maxim "*actio personalis moritur cum persona*" will not be encroached upon in this class of cases.

ACCRETION — RIGHT OF RIPARIAN OWNER TO ARTIFICIAL EXTENSIONS OF HIS BANK. — Two islands, owned by the plaintiff and the defendant, respectively, were separated by a navigable slough. The state built a dyke across the head of the slough, with the result that sandbars formed and gradually connected the islands. This process was greatly accelerated by the use of the slough as a dumping ground for sand dredged by the state from another channel. The plaintiff now sues to quiet title to that part which he claims as his proportionate share of the accretion. *Held*, that he is entitled to the relief sought. *Gillihan v. Cieloha*, 145 Pac. 1061 (Ore.).

It seems well settled that a riparian owner is entitled to accretions although they arise incidentally from the presence of a wharf, dyke, or other artificial condition. *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002; *Roberts v. Brooks*, 78 Fed. 411, 415. Such structures, however, must not have been erected by the riparian owner himself with the object of causing the accretion. See *Attorney-General v. Chambers*, 4 DeG. & J. 55, 69. The principal case, admittedly presents an extraordinary example of accretion from artificial causes, for the extension was largely due to the notorious use of the slough as a dumping ground for sand dredged elsewhere by the state. But the court takes the position that as against everyone but the state, the plaintiff is entitled to this artificial addition to his banks. While there is little authority on the point, the result seems just enough. Certainly, the riparian owner would prevail against a wrongdoer who had made such a deposit in front of the uplands. *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. 7; *City of Memphis v. Wail*, 102 Tenn. 274, 52 S. W. 161. And in the principal case, where the state does not claim the new land, it is equitable to consider it accretion as between the rival owners and to divide it in such proportions as will best preserve their valuable water rights, — especially as a possessory title upon public lands has been held sufficient to maintain the statutory suit to quiet title. *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30. Furthermore, it would be doubtful whether the state, having filled in the slough and made it useless for navigation, could thereafter assert title thereto. See *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102, 125.

BANKRUPTCY — DISCHARGE — EFFECT OF DISCHARGE ON SURETY'S CONTINGENT CLAIM TO INDEMNITY. — The principal obligor broke the contract prior to bankruptcy. After the discharge of the principal obligor, the surety paid the creditor, and now sues the principal for reimbursement. *Held*, that his recovery is barred by the discharge. *Williams v. United States Fidelity, etc. Co.*, U. S. Sup. Ct. Off., No. 80 (Feb. 23, 1915.)

The present Bankruptcy Act, unlike its predecessor, does not provide specifically that contingent claims shall be provable. As a result the law on the point is in confusion. On principle it would be desirable to free the bankrupt from as many of his obligations as are susceptible of valuation, but some of

the federal courts, in seeming disregard of this policy, have held contingent claims never provable. *In re Levy*, 208 Fed. 479. Other decisions find warrant in the general spirit of the act for allowing contingent claims to be proved. *In Re Caloris Mfg. Co.*, 179 Fed. 722. Cf. *In re Scott Transfer Co.*, 216 Fed. 308; see 27 HARV. L. REV. 469. As yet, the Supreme Court has not been forced to decide the question, for in the only case involving the problem the claim was deemed incapable of liquidation. *Dunbar v. Dunbar*, 190 U. S. 340. In the principal case, the court holds that § 57 *i*, which allows the surety to prove in the creditor's name if the latter is remiss, amply protects the surety and justifies holding his claim discharged. This settles the matter satisfactorily as far as sureties are concerned, but unfortunately leaves the general question undecided, with no intimation, however, that in a proper case a contingent claim would be held not provable.

BANKRUPTCY — DISSOLUTION OF LIENS — LIEN ACQUIRED WITHIN FOUR MONTHS ON PROPERTY FRAUDULENTLY CONVEYED. — An insolvent made a conveyance which, under the state law, was fraudulent only as to existing creditors. Two years later these creditors brought suit to set the conveyance aside and attached the property. Within four months of this attachment the insolvent was petitioned into bankruptcy, and the attachment lien was preserved for the benefit of the estate under § 67 *f* of the Bankruptcy Act, which voids all liens obtained through legal proceedings within four months of the petition unless the court orders the lien preserved for the benefit of the estate. The property sold for less than the debts of the attaching creditors and they now claim the whole proceeds. *Held*, that the proceeds will be distributed among all the creditors of the estate. *Globe Bank & Trust Co. of Paducah, Ky. v. Martin*, 236 U. S. 288.

Under § 70 *e* of the Bankruptcy Act, the trustee can set aside a fraudulent conveyance which any creditor could set aside, even though no creditor has acted and the four months' period has elapsed. *Thomas v. Roddy*, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473. If the creditors have taken action in the state court and then bankruptcy intervenes within four months of their attachment of the property, their lien will be avoided under § 67 *f* unless ordered preserved for the benefit of the estate. *Clarke v. Larremore*, 188 U. S. 486. If preserved, it becomes a part of the bankrupt's estate, and, although under the state law the existing creditors alone could have profited by setting aside the conveyance, all creditors must now share alike. *First National Bank v. Staake*, 202 U. S. 141. Nor can these creditors claim that their position in the state court created a priority granted by the state law and retained for them by § 64 *b* (5), for that section contemplates priorities of an entirely different nature, depending upon the furnishing of labor or materials and the like. See *In re Laird*, 109 Fed. 550; *In re Bennett*, 153 Fed. 673. Whether such an attachment levied after four months on property fraudulently conveyed would itself constitute an act of bankruptcy under § 3 *a* (3), as a preference suffered or permitted through legal proceedings, was not here before the court. Such would seem to be the result, however, if the property for this purpose can be considered as belonging to the bankrupt, and a creditor would then be able to derive no benefit whatever from his individual diligence in attaching the property at a time when the fraudulent conveyance itself has ceased to be available as an act of bankruptcy. See *Wilson v. Nelson*, 183 U. S. 191, 198.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — RIGHTS OF LESSEE OF PROPERTY EXEMPTED FROM TAXATION BY LEGISLATIVE CONTRACT. — The charters of two railroads exempted them from taxation beyond one-half of one per cent of their annual incomes and authorized leases of the franchises. In pursuance of this authority and of a subsequent

act sanctioning the specific transaction, the railroads were leased to the plaintiff corporation with an option of perpetual renewal. The leased roads were then taxed to the plaintiff, the lessee, as owner of the fee, at more than one-half of one per cent on their incomes. *Held*, that the tax will be enjoined as an impairment of the obligation of the contract to exempt. *Wright v. Central of Georgia Ry. Co.*, U. S. Sup. Ct. Off., No. 161 (March 22, 1915).

Alleged contracts of a state legislature exempting property from taxation are viewed with hostility by the courts, and will not be protected under the contract clause of the Constitution unless a legal obligation is conclusively established. *Christ Church v. Philadelphia*, 24 How. (U. S.) 300. The charters in the principal case meet this test and in fact had already been interpreted to constitute a binding contract with the lessor railroads. *Wright v. Georgia R. & B. Co.*, 216 U. S. 420. But the hostility of the law toward limitations of this kind is so great that the exemption, even when established, does not follow the property into the hands of transferees of the contracting party unless the legislature clearly so intended. *Rochester Ry. Co. v. Rochester*, 205 U. S. 236; *Getton v. University of the South*, 208 U. S. 489. The principal case finds that such an intent is evidenced by the cumulative force of the peculiar facts surrounding this particular lease. It expressly negatives the implication that the fee would be exempt into whosoever hands it might come, or that an interest less than the fee could not be taxed. The question is one of degree, which must be determined by the process of judicial inclusion and exclusion, and the principal case is significant only as establishing a datum in that process.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL, AND RELIGIOUS — LIBERTY TO CONTRACT: REGULATION OF HOURS OF LABOR. — A California statute forbade the employment of any woman in certain industrial and mercantile occupations for a longer period than eight hours in one day or forty-eight hours in one week. CAL. STAT., 1911, p. 437. A hotel proprietor was arrested for violating the statute by allowing a chambermaid in his employ to work nine hours in one day. He now attacks the validity of the statute by *habeas corpus* proceedings. *Held*, that the statute is constitutional. *Miller v. Wilson*, 236 U. S. 373.

This same statute was later so amended as to apply to women employed in hospitals, with the exception of graduate nurses. CAL. STAT., 1913, p. 713. A woman pharmacist employed in a hospital seeks to restrain its enforcement on the ground that it violates the Fourteenth Amendment. *Held*, that the statute is constitutional. *Bosley v. McLaughlin*, 236 U. S. 385.

These decisions establish the power of legislatures to shorten the hours of women's labor to a greater extent than some authorities had considered allowable. See *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454; FREUND, POLICE POWER, § 314. It has, however, become clearly established that a ten-hour day for women may be prescribed by statute. *Riley v. Massachusetts*, 232 U. S. 671; *Muller v. Oregon*, 208 U. S. 412; *People v. Elerding*, 254 Ill. 579, 98 N. E. 982; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52. This slight additional restriction, in view of the conditions of modern industrial life, cannot be deemed so unreasonable as to exceed the police power of the state. *State v. Somerville*, 67 Wash. 638, 122 Pac. 324. *Earnshaw v. Newman*, 47 Chi. Leg. News, 281 (Sup. Ct., D. C.). For a discussion of the constitutional principles involved, see 21 HARV. L. REV. 495. The second case illustrates the somewhat unequal results of the necessarily imperfect fashion in which classes of occupations and employees must be defined by legislatures. Such legislative classifications, however far from perfect, will be upheld by the courts to the verge of caprice. See *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. But in legislation of this charac-

ter, better results might be secured, it would seem, by delegating to administrative boards, similar to those now administering the minimum wage statutes in several states, the task of fixing the exact fields of industry to which the restrictions should apply. See 2 GEO. V, c. 2; WIS. LAWS, 1913, ch. 381; 4 AM. LAB. LEG. REV. 13; 28 HARV. L. REV. 89.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: TAXATION — STAMP TAX ON BILL OF COSTS IN STATE COURT. — The United States War Revenue Act of October 22, 1914, on a fair construction, required a litigant in a state court to affix a revenue stamp to his bill of costs, and forbade the clerk of court to certify the bill before a stamp was attached. *Held*, that the provision is unconstitutional. *Neldert v. Chicago, R. I. & P. R. Co.*, City Ct., N. Y., Feb. 9, 1915 (not yet reported).

Congress may not impede the states in the exercise of their reserved governmental powers, one of which is the administration of justice. *Collector v. Day*, 11 Wall. (U. S.) 113; *Beltman v. Warwick*, 108 Fed. 46. Although a tax, the financial burden of which falls directly or indirectly on the state, is the usual mode in which this has been attempted, embarrassments of every description are equally obnoxious to the Constitution. *Jones v. Keep*, 19 Wis. 369; see *McNally v. Field*, 119 Fed. 445, 447. So the tax in the principal case, although it comes out of the litigant's pocket, is objectionable because payment of it is made a condition precedent to execution of the state court's judgment. It has been suggested that the litigant might be held personally liable for the tax, even though the state court's process could not be obstructed to enforce payment. See Downer, J., *diss.*, in *Jones v. Keep*, *supra*, 388. But it is submitted that such a tax on the privilege of seeking justice in the state tribunals would likewise contravene the right of the state to administer justice on its own terms among those who resort to its courts.

CONTRIBUTION — SHIFTING OF CRIMINAL PENALTY TO ONE PRIMARILY RESPONSIBLE. — The plaintiffs, moneylenders, hired the defendants to address envelopes to persons whose names appeared in a certain handbook, but to omit minors. The defendants carelessly included a minor among the addressees, and the plaintiffs innocently sent him a circular. The plaintiffs were convicted of the statutory misdemeanor of sending a moneylender's circular to an infant without reasonable grounds to believe him of full age. This is an action to recover the amount of the fine and costs. *Held*, that only nominal damages are recoverable. *R. Leslie (Ltd.) v. Reliable Advertising and Addressing Agency (Ltd.)*, [1915] 1 K. B. 652.

For a discussion of the novel question of whether one who has suffered a criminal penalty may recover its amount in damages from the one who was responsible for his committing the crime, see NOTES, p. 687.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — RESTRICTION ON TRANSFER OF SHARES IN AGREEMENT OF ASSOCIATION. — Under a Massachusetts statute which provided that any restrictions on the transfer of stock should be set forth in the agreement of association, it was provided in the agreement and noted on the certificates that none of the shares should be transferred without consent of three-fourths of the capital stock. The defendants acquired stock without complying with this requirement, and now claim to be stockholders and hence qualified to act as directors, on the ground that the restriction is void. *Held*, that the restriction is valid. *Long-year v. Hardman*, 219 Mass. 405, 106 N. E. 1012.

Corporations, like other associations of individuals, often find it expedient for various reasons to limit the admission of new members. While this is usually accomplished by placing restrictions on the transfer of the stock, the

consequent restraint on alienation has not usually been deemed to be against public policy. See *Bargate v. Shortridge*, 5 H. L. Cas. 297, 311; *Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; GRAY, RESTRAINTS, 2 ed., § 29 d. Any such restriction, however, must acquire its force either from incorporation in the agreement of association as one of the original incidents of the share or else by means of a by-law in some way binding upon the holders. It is generally said that a mere by-law is not sufficient to create the restriction on the right to transfer the stock. *Kinnan v. Sullivan County Club*, 26 N. Y. App. Div. 213, 50 N. Y. Supp. 95; *Sargent v. Franklin Insurance Co.*, 8 Pick. (Mass.) 90. Cf. *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129. But even a by-law will effectively impose the restriction if the stock recites the limitation, or is clearly taken on those terms. *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432; *Barrett v. King*, 181 Mass. 476, 63 N. E. 934. Cf. *Nicholson v. Brewing Co.*, 82 Oh. St. 94, 91 N. E. 991. See Uniform Stock Transfer Act, § 15. On the other hand, by express agreement among themselves the stockholders themselves may restrict the transfer of shares almost without limitation. See *Fitzsimmons v. Lindsay*, 205 Pa. 79, 82, 54 Atl. 488, 489; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; 20 HARV. L. REV. 328. Similarly, where the restrictions are found in the agreement of association and referred to on the certificates, they are treated as inherent in the share itself and consequently bind all holders. *Gibbs v. Long Island Bank*, 83 Hun (N. Y.) 92, 31 N. Y. Supp. 406. In the principal case the statute itself showed there was no policy against restrictions, and there was no valid objection, therefore, to limitations expressed in the agreement and repeated in the certificates, and found by the court to be entirely reasonable in view of the nature and purposes of the association.

DAMAGES — MEASURE OF DAMAGES: TORT — SEVERANCE FROM REALTY: WILFUL AND INNOCENT TRESPASS. — The defendants carried off a quantity of ore from the plaintiff's mine, milled it, and sold the finished product. Part of the ore was taken with knowledge of the plaintiff's rights. In an action of trespass, the court instructed the jury that the measure of damages for innocent trespass was the gross proceeds of the sale less all the defendant's expenses; but that when the trespass was wilful, the defendant was entitled to no deductions. *Held*, that these instructions are correct. *Liberty Bell Gold Mining Co. v. Moorhead Mining & Milling Co.*, 145 Pac. 686 (Colo.).

By the weight of authority, the measure of damages for an innocent trespass is, as stated in the principal case, the value of the ore in the ground, plus any profits of the transaction. *Forsyth v. Wells*, 41 Pa. 291; *Burke Hollow Coal Co. v. Lawson*, 151 Ky. 305, 151 S. W. 657. See *Winchester v. Lang*, 33 Mich. 205; *Dougherty v. Chestnut*, 86 Tenn. 1. This rule adequately compensates the plaintiff for the injury suffered, and inflicts no penalty on the defendant. A harsher rule, allowing the plaintiff to recover the value of the ore after severance, is in force in some jurisdictions. *Donovan v. Consolidated Coal Co.*, 187 Ill. 28, 58 N. E. 290; *Barton Coal Co. v. Cox*, 39 Md. 1. A few states apply this larger measure of damages only when the action is in trover. *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.*, 135 Ala. 579, 33 So. 547. Cf. *Warrior Coal & Coke Co. v. Mabel Mining Co.*, 112 Ala. 624, 20 So. 918. This distinction is objectionable as giving two measures of damages for the same injury. It does not exist, of course, where forms of action have been abolished. See SEDGWICK, DAMAGES, 9 ed., § 500 *et seq.* Where the trespass is wilful, the plaintiff, by the great weight of authority, can recover the full value of the converted article at the time of demand. *St. Clair v. Cash Gold Mining & Milling Co.*, 9 Colo. App. 235, 47 Pac. 466; *Liberty Bell Co. v. Smuggler Co.*, 203 Fed. 795. Cf. *Single v. Schneider*, 30 Wis. 570; *McGuire v. Boyd Coal & Coke Co.*, 286 Ill. 69,

86 N. E. 174. If the defendant's right to recover his expenses depended upon a quasi-contractual counterclaim, this result would be correct, for the wrongdoer has no claim in quasi-contract. See 22 HARV. L. REV. 419, 425. The courts, however, have not treated the question in this way, but give the plaintiff compensation beyond his injury on the theory of exemplary damages. From this point of view the result seems unjustifiable, as the plaintiff has suffered no more injury than if the trespass had been innocent, and deserves no greater compensation.

EMINENT DOMAIN — WHAT PROPERTY CAN BE TAKEN — LAND ALREADY DEVOTED TO THE SAME PUBLIC USE. — An electric railway company acquired a site for a power plant and was proceeding with due diligence to develop it for use. Another railway company seeks to take the land for the same purpose by eminent domain under a general statute. *Held*, that it cannot do so. *State v. Superior Court for Spokane County*, 145 Pac. 999 (Wash.).

This decision is undoubtedly correct. It is true that property already held for a public use is still subject to the state's power of eminent domain. *Central Bridge Corp. v. Lowell*, 4 Gray (Mass.) 474. And property may be taken from private into public ownership to be used for the same public purpose. *In the Matter of the City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983; *Brady v. Atlantic City*, 53 N. J. Eq. 440, 32 Atl. 271. But it is not within the power of the legislature to authorize a private individual or corporation to take property already devoted to public use to be used for the same purpose and in the same manner, for this would merely effect an arbitrary transfer of the property of one person to another without the justification of public necessity or benefit which is the basis of the right of eminent domain. *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92; and see *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506, 512; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 537; 2 LEWIS, EMINENT DOMAIN, 3 ed., § 440. The result of this case could also be reached by statutory construction, for unless greater power is given expressly or by necessary implication, general eminent domain statutes give the right to take land already in public use, only upon the condition that the loss of the part taken will not seriously impede this existing use and that the condemnor can show a reasonable necessity for it. *In the Matter of the City of Buffalo*, 68 N. Y. 167; *Rutland-Canadian R. Co. v. Central Vermont Ry. Co.*, 72 Vt. 128, 47 Atl. 399; *Butte A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 41 Pac. 232; see 18 HARV. L. REV. 313. But see *Marin County Water Co. v. Marin County*, 145 Cal. 586, 79 Pac. 282.

EVIDENCE — CHARACTER OF PARTIES — ADMISSIBILITY IN CIVIL SUITS INVOLVING MORAL TURPITUDE. — In an action upon a fire insurance policy, the defendant sought to defeat recovery upon the ground that the insured, who died before trial, had fraudulently overstated his loss. On this issue evidence of the good reputation of the insured for truth and honesty was given. *Held*, that such evidence is admissible. *Rasmusson v. North Coast Fire Ins. Co.*, 145 Pac. 610 (Wash.).

Attempts have been made at various times to engraft exceptions upon the general rule excluding evidence of the character of the parties in civil suits where it is not itself in issue. In negligence cases the reputation of the negligent person has been admitted where there were no eyewitnesses. *Chicago, R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113. But see 12 HARV. L. REV. 500, 568. Another exception was attempted in an early New York case, where the act involved moral turpitude and was based solely upon circumstantial evidence. *Ruan v. Perry*, 3 Cai. (N. Y.) 120. But this case was promptly overruled and is generally repudiated to-day. *Gough v. St. John*, 16 Wend. (N. Y.) 646. See 1 WIGMORE, EVIDENCE, § 64. Upon analogy to the ordinary rule in criminal cases allowing

the accused to show his own good character, another exception has been introduced in actions for slander imputing a crime, where truth has been pleaded. *Harding v. Brooks*, 5 Pick. (Mass.) 244; *Downey v. Dillon*, 52 Ind. 442. *Contra*, *Matthews v. Huntley*, 9 N. H. 146; *Houghtaling v. Kelderhouse*, 2 Barb. (N. Y.) 149 (affirmed 1 N. Y. 530). A somewhat similar exception has been advocated wherever, as in the principal case, the act in issue is itself also a crime. *Hein v. Holdridge*, 78 Minn. 468, 81 N. W. 522. *Contra*, *Continental Ins. Co. v. Jacknichen*, 110 Ind. 59, 10 N. E. 636; *Adams v. Elseffer*, 132 Mich. 100, 92 N. W. 772. In following the analogy of the criminal cases, these two last exceptions overlook the historical fact that the rule in criminal cases is an exception made in favor of the criminal in an attempt to mitigate the severity of the old English criminal law. See *Matthews v. Huntley*, *supra*, 148. This consideration has no place in a civil suit. On the other hand, the dangers of complicating the issue, prolonging the trial and prejudicing the jury weigh heavily against extending the exceptions to the character rule.

EVIDENCE — OPINION EVIDENCE — EXPERT TESTIMONY: CALCULATION OF PROBABILITY. — The defendant was indicted for having offered in evidence a typewritten document with knowledge of its fraudulent alteration. It was shown that certain peculiarities of the form and alignment of the letters of the alteration corresponded exactly with peculiarities in specimens of writing from the defendant's typewriter. The defendant brought out from testimony given by typewriter experts the many causes and great frequency of occurrence of such peculiarities. In answer to a hypothetical question propounded by the prosecution assuming a certain frequency to the appearance of each defect, an assumption apparently unwarranted by any evidence, an expert mathematician then calculated for the jury the chances of the coincidence of these defects in another machine as being one in four billion. *Held*, that the admission of this mathematician's testimony was reversible error. *People v. Risley*, 214 N. Y. 75, 108 N. E. 200.

For a discussion of mathematically determined probability and its use in evidence, see NOTES, p. 693.

EVIDENCE — OPINION EVIDENCE — HANDWRITING: TESTING LAY WITNESSES BY EXTRANEOUS TRUE AND FORGED SIGNATURES. — Witnesses who were acquainted with the defendant's handwriting from having seen him write or having seen his admitted signatures in the course of business, affirmed the authenticity of a disputed signature. On the cross-examination they were asked to pass upon the authenticity of other signatures, both true and forged. The merit of their answers was displayed by proving the authorship of these signatures in a manner which would have made authentic signatures admissible for the purpose of juxtaposition on the direct examination. *Held*, that such a test is not permissible. *Fourth National Bank of Fayetteville v. McArthur*, 84 S. E. 39 (N. C.).

The interesting problem of impeaching lay witnesses as to handwriting, which the case raises, is discussed in this issue of the REVIEW, p. 699.

EVIDENCE — OPINION EVIDENCE — SELF-DEFENSE: BYSTANDER'S OPINION OF DEFENDANT'S DANGER FROM DECEASED. — At a homicide trial the defendant pleaded self-defense and testified to her belief that the deceased was about to shoot. A witness, after describing the actions of the deceased, was then asked what he thought the deceased was doing with his right hand, and would have answered that "his impression" was that he "was attempting to draw a pistol." *Held*, that it was error to exclude this testimony. *Latham v. State*, 172 S. W. 797 (Tex. Cr. App.).

The lower court excluded the evidence on the ground that it was opinion

evidence. Where a witness is testifying to a person's actions or appearance the courts rightly show considerable freedom in allowing him to state his conclusion after relating all the facts, if it is otherwise difficult to convey the real situation to the jury. *Redford v. Birley*, 1 St. Tr. N. S. 1071, 1134; *Commonwealth v. Dowdican*, 114 Mass. 257; *State v. Buchler*, 103 Mo. 203, 15 S. W. 331. See 3 WIGMORE, EVIDENCE, §§ 1924, 1962, 1974. But if the witness's opinion, rather than the subject of it, is the evidential fact, it should be admissible entirely apart from the opinion rule. See GA. CODE, 1911, § 5874. Thus other people's statements are admissible when themselves evidential and not merely evidence of what they relate. See *Bacon v. Towne*, 4 Cush. (Mass.) 217, 240. In the principal case, the defendant had to show both that he thought the deceased would shoot and that he thought so reasonably. *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51. See 1 BISHOP, CRIMINAL LAW, 8 ed., § 305; 13 HARV. L. REV. 223. What a disinterested bystander thought the deceased would do is at least slightly probative of the reasonableness of defendant's opinion, and would apparently fall under no excluding rule. Yet such evidence is usually not admitted under a plea of self-defense. *State v. Rhoads*, 29 Oh. St. 171; *Smith v. Commonwealth*, 113 Ky. 19, 67 S. W. 32; *Louman v. State*, 109 Ga. 501, 34 S. E. 1019. *Contra*, *Thomas v. State*, 40 Tex. 36; *Cochran v. State*, 28 Tex. App. 422, 13 S. W. 651; see *Hawkins v. State*, 25 Ga. 207, 210. Though it would seem more reasonable to consider the evidence admissible, it may have been unwise for the court here to overrule the trial judge in his determination of the value of remotely relevant evidence, which depends so largely on discretion. See THAYER, PRELIMINARY TREATISE ON EVIDENCE, p. 516.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ENJOINING STATE PUBLIC SERVICE COMMISSION FROM ENFORCING STATUTE. — A statute of New Hampshire created a public service commission with power to promulgate and enforce rates and regulations, and provided that when the commission denied a rehearing there should be an appeal to the state supreme court. A railroad brought proceedings before the commission to test the constitutionality of a "mileage-book" statute which the commission was enforcing. It was held constitutional and a rehearing denied. Thereupon the railroad brings suit in the federal District Court to enjoin the enforcement of the statute by the commission. *Held*, that the proceedings will be held in abeyance until the railroad shall have exhausted its remedies before the state tribunals. *Boston & Maine R. Co. v. Niles*, 218 Fed. 944 (Dist. Ct., N. H.).

When the law deals with an administrative tribunal like this public service commission, with its combined legislative, executive, and judicial powers, its ordinary classifications necessarily break down. Proper results cannot be obtained without an analysis of the function being exercised in any given case. In determining their relations with state commissions of this sort, therefore, it is entirely proper that the federal courts should have made their interference depend upon the kind of action undertaken by the commission. The purely legislative matter of promulgating a rule or fixing a rate, it is clear that the federal courts will not enjoin. It has likewise been held that the federal courts will not interfere when the state legislative machinery is not yet exhausted because of the power of the state reviewing tribunal to substitute an order which it may deem proper. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210. After the rule has been settled, however, and the legislative stage passed, there may be an injunction in a proper case even though the state law expressly provides for an appeal to the state courts to test the propriety of the action. *Bacon v. Rutland R. Co.*, 232 U. S. 134. To this extent at least the Supreme Court has recognized that a commission is not a "court" within § 256 of the Federal Judicial Code, which forbids an injunction against a state court except in bankruptcy cases. See *Prentis v. Atlantic Coast Line Co.*, *supra*; 36 STAT. AT

L. 1162. But when, as in the principal case, the only question raised before the commission is as to the constitutionality of a statute which it is enforcing, the action of the commission is purely judicial in its nature. Consequently an appearance before the commission on such a matter would be equivalent to going into a state court, and under the ordinary doctrines of comity the federal court would then properly refuse to entertain the petition until the remedies afforded by the state courts had been exhausted. *Peck v. Jenness*, 7 How. 612; see note to *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 359. The apparent inconsistency involved in denying that the commission is a court within the Judicial Code, and at the same time recognizing its judicial character for the purposes of comity when it passes on the validity of a statute, should offend no one. The difficulty is not substantial, and results merely from paucity of legal terminology.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — CONTRACT TO WAIVE STATUTORY ABOLITION OF THE FELLOW SERVANT RULE. — State statutes abolished the fellow servant rule as applied to railroad employees, and substituted a rule of comparative negligence for the defense of contributory negligence. MISS. LAWS, 1908, c. 194; MISS. LAWS, 1910, c. 135. In his contract of employment the plaintiff assumed the risk of all injuries arising out of his own or a fellow servant's negligence. He was injured through his own negligence combined with that of a fellow employee. *Held*, that he may recover. *Illinois Central R. Co. v. Harris*, 67 So. 54 (Miss.).

A contract by which an employer is absolved from liability for negligent injury to his employees is generally held void as against public policy. *Little Rock & F. S. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808; *Consolidated Coal Co. v. Lundak*, 196 Ill. 594, 63 N. E. 1079; *contra*, *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 465. In England, however, a contract waiving the statutory abolition of the fellow servant rule is valid. *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357. But in this country the contrary view prevails. *Atchison, T. & S. F. Ry. Co. v. Fronk*, 74 Kan. 519, 87 Pac. 698; *Tarbell v. Rutland R. Co.*, 73 Vt. 347, 51 Atl. 6. Similarly where the vice-principal doctrine is adopted, a contract waiving recovery for injury by a negligent vice-principal is invalid. *Lake Shore & M. S. Ry. Co. v. Spangler*, 44 Oh. St. 471, 8 N. E. 467; *cf. Little Miami R. Co. v. Stevens*, 20 Oh. 415. In general, wherever a statute regulating the relation of master and servant is reinforced by criminal penalties, a private agreement to waive its benefits would be clearly invalid. *Ten-Hour Law for Street Ry. Corporations*, 24 R. I. 603, 54 Atl. 602; *Short v. Bullion-Beck & Champion Mining Co.*, 20 Utah 20, 57 Pac. 720. See *Holden v. Hardy*, 169 U. S. 366, 397; 26 HARV. L. REV. 262. On the other hand, a contract to waive the benefits of a civil statute designed to protect only the parties to the contract will be enforced; but if the purpose of the statute was to benefit the public generally the waiver will be invalid. The view of the principal case that it is against the policy of the statute to allow it to be waived seems sound, and in accord with the principles usually followed in this country.

ILLEGAL CONTRACTS — CONTRACTS COLLATERALLY RELATED TO SOMETHING ILLEGAL OR IMMORAL — ACTION BY MONOPOLY ON CONTRACT LEGAL IN ITSELF. — In an action to recover the price of goods sold to the defendant, the latter alleged as a defense that the plaintiff was an illegal monopoly of all the glucose manufacturers in the United States; and that for the purpose of perpetuating its control of the market the plaintiff had devised a profit-sharing scheme whereby rebates were paid to all purchasers provided that during the year last preceding they had dealt only with the plaintiff; and that each contract denied the right of the purchaser to resell. *Held*, that the answer alleged no defense.

Wilder Manufacturing Company v. Corn Products Refining Company, 236 U. S. 165.

For a discussion of this interesting question arising under the Anti-Trust Act, see NOTES, p. 691.

INSURANCE — MUTUAL BENEFIT INSURANCE — CHANGE OF BENEFICIARY: EFFECT OF PAYMENT OF ASSESSMENTS BY PRIOR BENEFICIARY. — The wife of a member of a fraternal benefit society paid the assessments on the policy, which named her as beneficiary, and had been delivered to her by her husband with permission to keep up the assessments. She was then divorced and the husband named a new beneficiary in accordance with the by-laws of the society. Further assessments tendered by her were refused by the society, and on the death of the insured she claims the proceeds of the policy. *Held*, that she cannot recover. *Schiller-Bund v. Knack*, 150 N. W. 337 (Mich.).

Unlike an ordinary life insurance policy, a fraternal insurance certificate, the terms of which permit the insured to change the beneficiary at his pleasure, gives the beneficiary no vested right. *Woodruff v. Tilman*, 112 Mich. 188, 70 N. W. 420; *Masonic Benefit Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25. But the beneficiary may otherwise acquire such an equitable right as to estop the member from exercising this power, as, for example, by a contract not to change the beneficiary. *Webster v. Welch*, 57 N. Y. App. Div. 558, 68 N. Y. Supp. 55; *In re Reid's Estate*, 170 Mich. 476, 136 N. W. 476; *Leaf v. Leaf*, 92 Ky. 166, 17 S. W. 354. But if, as the court finds on the facts in the principal case, there is a mere payment of the assessments by the beneficiary named, without any contract with the member, there is nothing to prevent the member's making the change. It is said that the beneficiary pays any assessments with full notice of the contingency of his right. *Jory v. Supreme Council*, 105 Cal. 20, 38 Pac. 524; *Fisk v. Equitable Aid Union*, 7 Sadler (Pa.) 567, 11 Atl. 84; *Spengler v. Spengler*, 65 N. J. Eq. 176, 55 Atl. 285. Nevertheless, it has been held that the prior beneficiary should have a lien for the amount of the assessments he has paid, on the ground that to deprive him of all relief would be unconscionable. *Grand Lodge A. O. U. W. v. McFadden*, 213 Mo. 269, 111 S. W. 1172; *cf. Supreme Council of Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299; see *Masonic Benefit Ass'n v. Bunch*, *supra*. But in the absence of mistake, payments made without any agreement, express or implied, appear to be purely voluntary, and should afford no basis for recovery. *Supreme Lodge N. E. O. P. v. Hines*, 82 Conn. 315, 73 Atl. 791; *Heasley v. Heasley*, 191 Pa. 539, 43 Atl. 364. The denial of all relief by the principal case is therefore proper, so long as its rather improbable construction of the facts is adopted.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — CONFLICT BETWEEN FEDERAL AND STATE POLICE REGULATIONS: SAFETY APPLIANCE LAWS. — A state statute required railroads to equip all cars with grab-irons and handholds. The Federal Safety Appliance Act subsequently imposed a similar requirement, with some different specifications as to details. The state railroad commission now brings suit for a violation of the state statute as to a car moving on a railroad engaged in interstate commerce. *Held*, that in this case the Federal Act has superseded the state statute. *Southern Ry. Co. v. R. R. Comm. of Indiana*, 236 U. S. 439.

The Supreme Court in this decision adds another to the long list of cases which hold that once Congress has acted in the exercise of its paramount power to regulate interstate commerce, the police power of the state is thereby ousted to that extent, even though the requirements imposed by state legislation are not themselves in conflict with the federal regulations. *Houston &*

Texas Ry. v. United States, 234 U. S. 342, 351; *Erie R. R. v. New York*, 233 U. S. 671. For a discussion of the principal case in the district court, see 26 HARV. L. REV. 757.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYER'S LIABILITY ACT: ASSUMPTION OF THE RISK AS AFFECTED BY EMPLOYER'S VIOLATION OF STATE FACTORY ACT. — The plaintiff was injured, while engaged in the car shops of an interstate carrier upon the repair of a car used in interstate commerce, by machinery left unguarded in violation of the state "factory act." He now sues under the Federal Employer's Liability Act, which provides (35 STAT. AT L. 65, c. 149, § 4) that no employee shall be held to have assumed the risks of his employment where the violation "of any statute enacted for the safety of employees contributed to the injury." *Held*, that assumption of the risk precludes recovery. *Lauer v. Northern Pacific Ry. Co.*, 145 Pac. 606 (Sup. Ct., Wash.).

The decision follows a recent *dictum* of the Supreme Court to the effect that the word "statute" in the above quoted provision must, in the interest of uniformity, be construed to refer to federal statutes only. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 503. In the actual case, however, the only state statute involved was a state liability statute which was plainly superseded by the federal act. If the act be construed as evidencing a desire for absolute uniformity in this particular, it would follow that no state statute enacted for the protection of employees, though not superseded by federal legislation, can have any effect in actions under the federal act. But it is submitted that violation of a subsisting state statute of this character would clearly be admissible to show negligence. See THORNTON, FEDERAL EMPLOYER'S LIABILITY, 2 ed., § 47. The prevailing tendency of recent common-law decisions has been to deny the defense of assumption of risk in case of injury due to violation of a statutory duty toward employees. See 26 HARV. L. REV. 262. Federal statutes of this character cover a relatively small portion of the field and leave in force a vast number of state statutes enacted for the protection of employees. It seems much more reasonable to think that Congress intended to adopt the prevailing common-law view as to the assumption of the risk of violation of any existing statutory duty, whether federal or state, than to think that in the interest of uniformity this large body of safety legislation was intended to be almost wholly overridden as to interstate employers, without the substitution of any similar federal legislation. It is to be regretted that the Washington court felt bound to overrule its previous decision. *Opsahl v. Northern Pacific Ry. Co.*, 78 Wash. 197, 138 Pac. 681.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — WHETHER COVENANT NOT TO ASSIGN BINDS ASSIGNEES NOT NAMED. — A lease contained a covenant not to assign without the consent of the lessor, with the usual clause of reentry. After one assignment by license, that assignee in turn assigned, but without permission. The lessor now seeks to enter for breach of the covenant, which did not in terms bind assignees. *Held*, that the plaintiff may enter. *Goldstein v. Saunders*, 138 L. T. J. 314 (Ch. Div.).

No question arises in this case as to whether the condition survived the first license to assign, since the rule in *Dumpor's Case*, that a prior license waiving a condition against assignment of the lease destroys the condition utterly, has been abrogated by statute in England. 22 & 23 VICT., c. 35; 23 & 24 VICT., c. 38, § 6. *Cf. Dumpor v. Symmes*, 4 Co. 119 b. There remains the problem whether the assignee was bound by a covenant not expressly naming assigns. If the covenant in terms mentions assigns, it runs with the land, and is binding upon them. *Williams v. Earle*, L. R. 3 Q. B. 739; *McEacharn v. Colton*, [1902]

A. C. 104. It no less touches and concerns the land when assigns are not expressly included. It seems clear, moreover, that these words are not required to make such a covenant run with the land under the rule in *Spencer's Case*, 5 Co. 16. The formula usually employed in such covenants and employed in the principal case, is "not to assign without the consent of the lessor." This, it has been said, shows that assignments by permission are contemplated, and that the covenant is accordingly intended to bar unauthorized assignments by any tenant. *Toronto Hospital Trustees v. Denham*, 31 Upp. Can. C. P. 203. Even without this formula, the covenant indicates merely that assignments were not contemplated, not that the covenant was to lose its force if one did occur. The principal case, therefore, takes what appears to be the common-sense view of the matter and substitutes the assignee for the original lessee, just as in any covenant running with the land. See 1 TIFFANY, LANDLORD AND TENANT, p. 936.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — WORDS IMPUTING IMMORALITY TO SCHOOL TEACHER: WHETHER ACTIONABLE *PER SE*. — The defendant charged the plaintiff, a school master, with immoral conduct with a certain woman. The jury found the words were spoken in such a way as to imperil the plaintiff's retention of his office, and imputed that he was unfit to hold it. *Held*, that the words are actionable *per se*. *Jones v. Jones*, 31 T. L. R. 245 (K. B. Div.).

The decision goes on the ground that the words tend to injure the plaintiff in his profession or calling. This class of slander *per se* may be divided into three heads. First, those words which impute the plaintiff's incompetency to fill his position although no mention of his business be made, as insolvency in the case of a merchant, or ignorance in the case of a doctor or school teacher. *Stanton v. Smith*, 2 Ld. Raym. 1480; *Cawdry v. Highley*, Cro. Car. 270. And see *Watson v. Vanderlash*, Hetley 69, 71. Although a charge of habitual drunkenness might be said to impute incompetency for almost any trade or profession, it is difficult to see how immorality of the sort charged in the principal case would have any such tendency, except possibly in the case of a clergyman. See *Dod v. Robinson*, Aleyn 63. Secondly, words which impute misconduct in the practice of a profession, but do not necessarily charge incompetency. In such cases it is necessary that the words be spoken of the plaintiff in his professional capacity. Charges of immorality or dishonesty against a physician, or insolvency against a solicitor, are examples of this class. See *Ayre v. Craven*, 2 A. & E. 2; *Dauncey v. Holloway*, [1901] 2 K. B. 441; *Jones v. Bush*, 131 Ga. 421, 62 S. E. 279. Thirdly come those cases where the plaintiff's position is a salaried one, and the charge made is one which if true would cause his dismissal although imputing neither incompetency nor misconduct in fulfilling professional duties. *Cf. Alexander v. Jenkins*, [1892] 1 Q. B. 797; *Galkwey v. Marshall*, 9 Exch. 294. On this ground a general charge of immorality against a school teacher may well be held actionable. See *Nicholson v. Dillard*, 137 Ga. 225, 73 S. E. 382.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — GENERAL RELEASE OF EMPLOYER UPON PAYMENT OF COMPENSATION: RIGHT TO SUBSEQUENT RECOVERY AGAINST THIRD PARTY. — The plaintiff was injured in the course of his employment under circumstances creating legal liability in a third party for negligent injury. The employer was found not to be negligent, but made payment to the plaintiff under the Workmen's Compensation Act, and received a general release. The plaintiff now sues the third party for damages. *Held*, that he may recover. *Jacowicz v. Delaware, L. & W. R. Co.*, 92 Atl. 946 (Ct. Err. & App., N. J.).

This decision is a counterpart of the cases holding that the release of a third party upon recovery of judgment against him does not exonerate the employer

from paying compensation, in the absence of special statutory provision as to subrogation. *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91. See 26 HARV. L. REV. 377. By electing to claim under the statute, the employee surrenders his common-law rights against his employer and becomes entitled to compensation without regard to the employer's negligence. Hence, even if the employer had been at fault, the release should have no particular significance, for it adds nothing to the legal effect of the statute itself. In either case there seems to be no reason why the statute should operate to shield third-party tortfeasors. Compensation was not received from the employer as tortfeasor, and was at most only partial reparation for the injury sustained. See 28 HARV. L. REV. 307. Even among joint tortfeasors the release of one upon partial satisfaction has been held to release the other only *pro tanto*. *Bailey v. Delta Electric Light, etc. Co.*, 86 Miss. 634, 38 So. 354. The result in the principal case is further justified by the amended New Jersey Act, which permits the compensated employee to sue a third party, the employer being entitled upon notice to such third party to repayment out of any settlement or judgment to the extent of his payments under the Act. N. J. LAWS, 1913, c. 174, § 8. Under the English Workmen's Compensation Act, precluding the recovery of both compensation and damages, a contrary conclusion is reached. *Mahomed v. Mawnsell*, 1 Butterworth's Work. Comp. C. N. s. 269. Most of the statutes in this country, however, have special provisions on the point, insuring the employee full, but no more than full, satisfaction. By the commonest of these, an employer having paid compensation is subrogated to his employee's rights against third persons, but must pay the employee any excess in recovery over compensation paid. See, for example, CONN. LAWS, 1913, ch. 138, pt. B, § 6.

MECHANICS' LIENS — ARCHITECT'S LIEN FOR PLANS ACCEPTED BUT NOT USED TO EFFECT ACTUAL IMPROVEMENT ON THE LAND. — An architect, under contract with the defendant, made plans for a building whose construction he was to superintend. After accepting the plans, but before any work had been done on the land, the defendant repudiated the contract. The mechanics' lien law, MINN. GEN. STAT., 1913, § 7020, gives anyone who contributes to the improvement of real estate a lien "upon such improvement and upon the land on which it is situated." *Held*, that the architect was entitled to a lien on the land on which the building was to have been erected. *Lamoreaux v. Andersch*, 150 N. W. 908 (Minn.).

The court reasons that the broad policy indicated by the mechanics' lien law demands a lien where there would have been an improvement if the owner had performed his contract, even though the statute literally requires an actual improvement. The motive which underlies mechanics' lien statutes seems to be a sense of the injustice of letting one man be enriched by another man's unpaid services. See PHILLIPS, MECHANICS' LIENS, § 6. They owe their legislative origin to the analogy of the common-law lien, which attached only to chattels actually improved by the bailee. See *Esterley's Appeal*, 54 Pa. 192, 193. The language of some statutes, it is true, is broader and indicates a departure from this traditional view that there must be on the land a tangible embodiment of the lienor's labor or substance; and it has been held under such statutes that there may be a lien for materials tendered but wrongfully rejected by the owner and never used on the land. *Thomas Trammell & Co. v. Mount*, 68 Tex. 210, 4 S. W. 377; *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170. The class of statutes to which the Minnesota law belongs, however, gives little countenance to such an interpretation; and there seems to be nothing in the purpose of the act which calls for judicial extension of its language. But see *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224. Under a statute which differs but slightly from that involved in the principal case, Iowa has reached the opposite result. *Foster v. Tierney*, 91 Ia. 253, 59 N. W. 56.

MUNICIPAL CORPORATIONS — MUNICIPAL DEBTS AND CONTRACTS — LIABILITY FOR BENEFITS RECEIVED UNDER CONTRACTS THAT EXCEED DEBT LIMIT. — A county borrowed money of the plaintiff beyond its constitutional debt limit, which could be exceeded only with the authority of the voters. The money so received, together with other funds which had been properly obtained, was used in the construction of a courthouse. The plaintiff now sues the corporation on a *quantum meruit*. *Held*, that he cannot recover. *Eaton v. Shawwassee County*, 218 Fed. 588 (C. C. A. Sixth Circ.).

The principal case illustrates an important distinction in the law of municipal corporations. Where benefits are received by the corporation pursuant to a contract that is invalid because of failure to observe a statutory requirement as to execution, but which is in substance a contract which the municipality has capacity to make, a quasi-contractual liability arises. *Louisiana v. Wood*, 102 U. S. 294; *Reynolds v. Lyon County*, 121 Ia. 733, 96 N. W. 1096. And even where there is total lack of capacity to enter into the contract, if the consideration can be readily returned, that must be done. *Crampton v. Zabriskie*, 101 U. S. 601; *Turner v. Cruzen*, 70 Ia. 202, 30 N. W. 483. But where, as in the principal case, the money has been mingled with other funds and invested in a structure, so that on principles of constructive trust the *res* cannot be followed into a severable product, the outsider has no relief whatever. *Litchfield v. Ballou*, 114 U. S. 190; *Bigler v. Mayor*, 5 Abb. N. C. (N. Y.) 51. There can be no property right by way of lien or otherwise in the building. *Litchfield v. Ballou*, *supra*; *Grady v. Pruitt*, 111 Ky. 100, 63 S. W. 283. Nor may the claimant have rental. *Gamewell Fire-Alarm Tel. Co. v. City of Laporte*, 102 Fed. 417. If the constitution has left the municipal corporation without capacity to create an express liability, there is no alternative for the court but to prevent the same burden from being laid upon the taxpayers indirectly through the action on a *quantum meruit*. See 17 HARV. L. REV. 343.

MUNICIPAL CORPORATIONS — PROCEEDINGS OF COUNCIL OR OTHER GOVERNMENTAL BODY — EFFECT OF BLANK BALLOT. — At an election for school superintendent by a school board, the defendant received five votes, there were three scattered votes, and three blank ballots. A majority of the votes cast was necessary for election. *Held*, that the defendant was duly elected. *Attorney-General v. Bickford*, 92 Atl. 835 (N. H.).

When the statute requires affirmative action by a majority of those present, the problem is quite distinct from that involved in the principal case. A blank ballot is then as effectual as a vote against the candidate. *People v. Conklin*, 7 Hun (N. Y.) 188; *Commonwealth v. Wickersham*, 66 Pa. 134. In the usual case, however, a majority of the votes actually cast is sufficient for an election. In determining the number of votes cast, a minority of jurisdictions, disagreeing with the principal case, hold that a blank ballot must be included, and so in effect count such a ballot against the leading candidate. *Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. 422. Thus in one case where each candidate received twenty-two votes and there was one blank ballot, it was held that there was no tie and that the mayor could not vote. *State v. Chapman*, 44 Conn. 595. This sufficiently shows the difficulties of the minority doctrine. A blank ballot cannot properly be construed as either for or against a candidate. In so far as it signifies anything it probably expresses an acquiescence in the action of the majority of those actually voting. *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 23 N. E. 72. But the principal case follows the better view and the weight of authority in holding that a blank ballot should be utterly disregarded. *Murdoch v. Strange*, 9 Md. 89, 57 Atl. 628; *Wheeler v. Commonwealth*, 98 Ky. 59, 32 S. W. 259.

PRIVACY, RIGHT OF — NATURE AND EXTENT OF THE RIGHT — POSSIBLE INTERESTS IN ONE'S NAME OR PICTURE. — The plaintiff secured from a certain

actress the exclusive right to use her picture on posterettes. The defendant thereafter, with the consent of the actress, published and sold posterettes bearing the same picture. *Held*, that an injunction will not be granted. *Pekas v. Leslie*, 52 N. Y. L. J. 1864 (N. Y. Sup. Ct.).

For a discussion of the New York statutory right of privacy and the rights involved in the unauthorized use of one's name or picture, see p. 689 of this issue of the REVIEW.

RAILROADS — LIABILITY FOR DAMAGE TO ANIMALS — BREACH OF DUTY TO FENCE. — The defendant railroad was under a prescriptive duty to maintain a fence between its property and the plaintiff's land. By reason of a defect in the fence, the plaintiff's cattle strayed upon the right of way and were killed by a locomotive. *Held*, that the plaintiff may recover. *Titus v. Pennsylvania R. Co.*, 92 Atl. 944 (N. J.).

The plaintiff's horse, through the defendant railroad's breach of its statutory duty to maintain a fence, escaped onto the defendant's tracks and was killed by falling off a bridge. *Held*, that the plaintiff may recover. *Davis v. Central Vermont Ry. Co.*, 92 Atl. 973 (Vt.).

Under the English common law, and the prevailing view in this country, maintenance of a division fence by one of two adjoining landowners for the prescriptive period subjects him and his successors to a duty to maintain it perpetually. See GALE, EASEMENTS, 8 ed., p. 465; *Binney v. The Proprietors of the Lands in Hull*, 5 Pick. (Mass.) 503. *Casner v. Riegel*, 54 N. J. L. 498, 24 Atl. 484. But see *contra*, *Wright v. Wright*, 21 Conn. 329, 344; *Glidden v. Towle*, 31 N. H. 147, 169. Though generally called a "spurious easement," this obligation might more accurately be described as a prescriptive covenant running with the land. A breach of the obligation renders the owner of the servient land liable to the owner of adjoining land for all damage proximately ensuing from the breach. See GALE, EASEMENTS, 8 ed., p. 465; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. Civil liability for violation of a criminal statute imposing affirmative duties is not so sweeping; it exists only where the harm was clearly one which the statute was designed to prevent. See *Gorris v. Scott*, L. R. 9 Ex. 125; 27 HARV. L. REV. 317, 335. Accordingly, where a fencing statute expressly allowed recovery for injury caused by "agents, engines or cars" of the railroad, recovery for other kinds of injury was held to be excluded by implication. See *Schertz v. Indianapolis, B. & W. Ry. Co.*, 107 Ill. 577. One section of the fencing laws of Vermont contains a similar provision; but another section with a different legislative history, reaffirming the duty to fence, contains no reference to civil liability. VT. PUB. STATS. §§ 4453-6. The decision that a fall from the track was one of the things for which this section permits civil recovery seems sound.

RAILROADS — REGULATION OF RATES — STATE REGULATION: NON-COMPENSATORY RATES FOR PASSENGERS OR PARTICULAR COMMODITIES. — A North Dakota statute fixed maximum intrastate rates for the transportation of coal in carload lots. After the statute had been enforced for over a year, it was shown that on one of the railroads in question the receipts from the transportation of coal under the new rates exceeded the cost of transportation, including actual out-of-pocket expense of moving it together with all fixed or overhead expenses apportionable to such traffic, by only \$847. On the other road in question the total receipts under the new rates, while exceeding the out-of-pocket costs of moving the traffic, were some \$9,000 to \$12,000 less than the total costs including fixed and overhead expenses chargeable to the coal traffic. *Held*, that the statute is unconstitutional. *Northern Pacific Ry. Co. v. North Dakota*, U. S. Sup. Ct. Off. Nos. 420, 421 (March 8, 1915).

A West Virginia statute prescribed a maximum rate of two cents a mile for

the transportation of passengers within the state. After the rate had been tested by operating under it for two years, it was shown to yield a return only slightly, if at all, in excess of the actual out-of-pocket expense of conducting the service plus the apportioned share of fixed charges attributable to the passenger traffic. *Held*, that the statute is unconstitutional. *Norfolk & Western Ry. Co. v. Conley*, U. S. Sup. Ct. Off. No. 197 (March 8, 1915).

For a discussion of the principles involved in these cases see this issue of the REVIEW, p. 683.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — SIZE OF COMBINATION AS A BASIS FOR DISSOLUTION. — The United States brought a bill in equity against the Keystone Watch Case Company charging violations of the first and second sections of the Sherman Anti-Trust Act. It appeared that the defendant had acquired control of about fifty per cent of the industry and that it had since imposed restrictive agreements upon jobbers to whom the product was sold. But no inflation of prices, limitation of production, or other abuse of power was shown. *Held*, that the unfair practices be enjoined, but that the petition for dissolution be dismissed. *United States v. Keystone Watch Case Co.*, 218 Fed. 502 (Dist. Ct., E. D., Pa.).

Since the decree by the federal district court in Minnesota dissolving the International Harvester Company, and pending the appeal to the United States Supreme Court, a number of opinions have been given in coördinate courts that display a sharp divergence from the construction laid upon Section 2 of the Sherman Act by that decision. In the principal case three circuit judges adopt the principles to be found in the dissent of Sanborn, J., in the Harvester case, and accept the rule that size alone does not constitute monopoly within the meaning of the Act. See *United States v. International Harvester Co.*, 214 Fed. 987, 1002. There must be unreasonable use of power, and actual or threatened injury to the public to warrant dissolution. See 28 HARV. L. REV. 87. In the "fighting ships" case the court dealt with a combination of steamship lines that was using certain unfair methods, but that decree also stopped short of dissolution and simply enjoined the illegal practices. *United States v. Hamburg American S. S. Line*, 216 Fed. 971. In another steamship case the government established that a large consolidation had taken place, but here too the petition for dissolution was dismissed because no one could be found among shippers, competitors, or the general public who was dissatisfied with it, or who could show unreasonable injury therefrom. *United States v. American-Asiatic S. S. Co.*, 220 Fed. 230. In any case where the record of a combination is likewise barren of grievances on the part of the public or of individuals, to enforce its dissolution solely on account of magnitude is a step thoroughly hostile to the industrial development of the country.

SPECIFIC PERFORMANCE — PARTIAL PERFORMANCE WITH COMPENSATION — CREATION OF DOWER RIGHT IN STRANGER APART FROM SEISIN OF THE HUSBAND. — An owner of land, whose wife had a statutory interest in the property similar to dower, made a contract to convey to the plaintiff in which the wife did not join. The wife later joined with him in a conveyance to the defendant, who had notice of the plaintiff's claim. The plaintiff now brings a bill for specific performance. *Held*, that the defendant convey such interest as the plaintiff could have acquired from the vendor with suitable abatement from the purchase price, or at his own election, convey the whole. *Williams v. Wessels*, 145 Pac. 856 (Kan.).

A release of inchoate dower operates as an extinguishment of the wife's interest. *Withaus v. Schack*, 105 N. Y. 332, 11 N. E. 649; *Chicago Dock Co. v. Kinzie*, 49 Ill. 280. See *Tirrel v. Kenney*, 137 Mass. 30, 32. Consequently it has been held hitherto that a purchaser with notice who gets a conveyance

free from dower must convey to the prior purchaser who did not secure the wife's signature, upon receiving the purchase price or such portion thereof as shall put him *in statu quo*. *Saldutti v. Flynn*, 72 N. J. Eq. 157, 65 Atl. 246; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544. However, he has in effect purchased for value a portion of the rights in the freehold to which an instant before the conveyance the prior purchaser was not entitled in law or equity. *Mix v. Baldwin*, 156 Ill. 313, 40 N. E. 959; *Richmond v. Robinson*, 12 Mich. 193. And therefore there is reason to revive the incumbrance and give him the value of his bargain to that extent. On the other hand inchoate dower, as such, cannot be aliened. *Mason v. Mason*, 140 Mass. 63, 3 N. E. 19; *Wilthaus v. Schack*, *supra*. See LAMBERT, DOWER, p. 26. But the husband is often compelled to convey his interest alone, leaving the dower in the wife. *Davis v. Parker*, 14 Allen (Mass.) 94. See 25 HARV. L. REV. 731. To this extent, at least, the policy against allowing the fee and the inchoate dower interest to be held by parties who are strangers to each other has never controlled. Nor does it seem too much against policy for the court in the principal case to revive this anomalous interest in the subsequent purchaser, at least in jurisdictions such as Kansas, where there have been indications of a liberal attitude toward inchoate dower. See *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. 159. The abatement of the purchase price granted in the principal case would be refused by some courts in a suit against the husband, because of the tendency to coerce the wife. *Reisz's Appeal*, 73 Pa. 485; *Bride v. Reeves*, 36 App. D. C. 476. But no such difficulty arises here, and in the manner of allowing compensation the court also follows the weight of authority, computing it according to the theory of probabilities instead of giving indemnity to the purchaser by reserving until the wife's death the value of vested dower, subject to interest. *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934; *Davis v. Parker*, *supra*; *Sanborn v. Hookin*, 20 Minn. 178; see 25 HARV. L. REV. 731.

TRADE UNIONS — PUNISHMENT OF OUTSIDE PARTY — SUIT TO RESTRAIN LABOR UNION FROM COMPELLING MEMBERS NOT TO TAKE EMPLOYMENT BY THREATENING FINE. — The plaintiff, having entered into a contract with certain members of defendant union, which comprised practically all the musicians of Rhode Island available, refused to go on with the contract, claiming that unsatisfactory music was furnished. He then arranged with other members of defendant union to play for him, whereupon the directors of the union having heard both sides of the dispute with the first orchestra and decided that the plaintiff had wrongfully broken his contract, acted in accordance with a by-law of the union and forbade all union members to enter or continue in the employ of the plaintiff. The lower court granted a preliminary injunction restraining the defendants from interfering with the business of the plaintiff or attempting to collect any fines from its members by way of enforcing the order of the directors. Held, that the injunction be dissolved. *Rhodes Brothers v. Musicians' Protective Union Local, etc.*, 92 Atl. 641 (R. I.).

For a discussion of the use of fines and other disciplinary measures to enforce a union by-law for the punishment of an outsider, see NOTES, p. 696.

TRUSTS — CREATION AND VALIDITY — BEQUEST ON SECRET UNDERSTANDING: LIABILITY OF LEGATEE TO TRANSFER TAX. — The testator bequeathed his personalty to his brother, who had agreed to distribute it in accordance with the testator's wishes as expressed in an unattested memorandum which was not referred to in the will. The memorandum, the contents of which were not communicated to the legatee until the testator's death, directed the money to be given to certain charities. Without having made a full distribution the legatee died, and left the property to the defendant under a similar agreement to distribute in accordance with the memorandum. The state now seeks to

tax the defendant under the Inheritance Tax Law. ILL. REV. STAT., c. 120, § 366. *Held*, that the defendant is not taxable. *People v. Schaefer*, 107 N. E. 617 (Ill.).

When a testator leaves property to a legatee with the informal understanding that he is to hold in trust for certain beneficiaries, it would be a fraud for the legatee to keep for himself, and the courts accordingly raise a constructive trust in favor of the beneficiaries to prevent unjust enrichment. *In re Fleetwood*, 15 Ch. D. 594; *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876; *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945. As it is impossible to restore the *statum quo*, and enable the testator to do over again properly what he tried to do improperly, the chief argument for imposing a resulting trust when an express trust fails with the settlor living, has no application. See 20 HARV. L. REV. 549, 554. Where the legatee, however, is ignorant of the names of the *cestuis* until the testator's death, the English courts, at least, have refused to enforce the trust, saying that it would violate the Wills Act to ascertain the names by an unattested document. *In re Boyes*, 26 Ch. D. 531. *Cf. McCormick v. Grogan*, L. R. 4 H. L. 82; *Walgrave v. Tebbs*, 2 K. & J. 313. But see *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614. But even the English courts have not hesitated to examine an unattested document when the question was what part of the property was held in trust. *In re Maddock*, [1902] 2 Ch. 220. And irrespective of the enforceability of the trust, it would seem that the legatee should at least be permitted to carry out the testator's wishes. *In re Dean*, 41 Ch. D. 552; see 28 HARV. L. REV. 237, 263. The question remains whether the legatee should be subject to the Illinois inheritance tax, which exempts beneficial interests passing by will or intestacy to charities. ILL. REV. STAT., c. 120, § 366. The New York court has held in a similar case that it is the constructive trustee to whom the beneficial interest passes by will. *In re Edson*, 38 App. Div. 19, 56 N. Y. Supp. 409; *aff'd* 159 N. Y. 568, 54 N. E. 1092. See N. Y. CONSOL. LAWS, TAX LAW, §§ 220, 221. But the charitable *cestuis* do take beneficially by virtue of an imperfect right arising before the testator's death, although not strictly under the will, and it seems a preferable construction, therefore, to hold that the property passes to them free of tax.

VENDOR AND PURCHASER — REMEDIES OF PURCHASER — MERGER OF EXECUTORY CONTRACT OF SALE BY ACCEPTANCE OF DEED. — A vendor covenanted to convey land by a deed of special warranty, clear of all incumbrances. The purchaser paid over the purchase money and accepted a deed which contained only special warranty and no general covenant against incumbrances. The land having been sold on execution to satisfy an unknown preëxisting incumbrance, the purchaser brings this action to recover back the purchase money. *Held*, that the purchaser can recover. *White v. Murray*, 218 Fed. 933 (Dist. Ct., W. D. Pa.).

There is no implied warranty of title in sales of real property. It follows that a vendor selling land is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Clare v. Lamb*, L. R. 10 C. P. 334; *Union Pacific Ry. Co. v. Barnes*, 64 Fed. 80; see MAUPIN, MARKETABLE TITLE, 2 ed., § 267. And by the weight of authority, in the absence of fraud or mistake, even express promises to give good title, whether written or oral, are held to be merged in the final acceptance of a deed, on the principle that the deed is the instrument in which the last agreement of the parties as to the risk of defective title is to be found. *Whittemore v. Farrington*, 76 N. Y. 452; *Bryan v. Swain*, 56 Cal. 616; *Porter v. Cook*, 114 Wis. 60, 89 N. W. 823; *Fuson v. Chestnut*, 33 Ky. L. Rep. 249, 109 S. W. 1192; see MAUPIN, MARKETABLE TITLE, 2 ed. §§ 181, 269. Some cases, however, are very liberal in admitting extrinsic evidence to determine whether the deed was accepted in discharge

of previous agreements as to title. *Davis v. Lee*, 52 Wash. 330, 100 Pac. 752; *Read v. Loftus*, 82 Kan. 485, 108 Pac. 850; and *cf. Slocum v. Bracy*, 55 Minn. 249, 56 N. W. 826. And the Pennsylvania cases, which this decision follows, go still further and hold that promises of good title are collateral in their nature and survive the acceptance of the deed, in so far as they have not been embodied in it. *Close v. Zell*, 141 Pa. 390, 21 Atl. 770; *Lehman v. Paxton*, 7 Pa. Super. Ct. 259. This seems an unsupportable departure from a rule long recognized as tending to prevent fraud and uncertainty and seems particularly objectionable when, as in the principal case, the presence of one covenant as to title appears by implication to exclude all others.

WAR — PRIZE — SHIPOWNER'S RIGHT TO FREIGHT IN TRADE WITH THE ENEMY. — The cargo of a British vessel while *en route* for Germany was seized at the outbreak of the war, and later condemned as prize. *Held*, that the owners are entitled to freight *pro rata itineris* completed at the time of seizure. *The Juno*, 50 L. J. 29 (Adm. Ct.).

Since freight is not due until delivery, a shipowner cannot ordinarily recover his freight if he has failed to deliver the cargo at the port of destination. *Osgood v. Groning*, 2 Camp. 466; *The Mary Riley v. Three Thousand Railroad Ties*, 38 Fed. 254. And if the owner of the cargo voluntarily accepts the goods at some other port he will become liable only for the freight *pro rata itineris*. *Luke v. Lyde*, 2 Burr. 882. See *Osgood v. Groning*, *supra*, 470. However, when a neutral vessel carrying enemy goods is detained and the goods are condemned, the shipowner can recover the full freight to the original port of destination. *The Hoop*, 1 C. Rob. 196. See Note, 3 C. Rob. 304; *CONSOLAT DEL MAR*, 3 TWISS, BLACK BOOK OF THE ADMIRALTY, p. 539. This rule seems to be based on the idea that the captor takes the place of the enemy consignee in all respects, and that the capture therefore amounts to delivery. See *The Copenhagen*, 1 C. Rob. 289, 291. It would also be unjust to deprive the neutral vessel of the freight which she was entitled to earn, since neutral vessels may rightfully engage in commerce with belligerents. But the subjects of belligerent nations lose the right to engage in trade with the enemy immediately on the declaration of war. See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., pp. 48 *ff*. When war was declared, therefore, the shipowner in the principal case lost the right to earn freight by the transportation of enemy goods. But until then he seems to be in much the same position as a neutral shipowner, and the rule awarding him freight *pro rata itineris* seems reasonable and just.

BOOK REVIEWS

THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY. By Garrard Glenn. Boston: Little, Brown, and Company. 1915. pp. xlv1, 461.

This volume contains the substance of a course of lectures delivered at the Columbia Law School. The aim of the lectures and of the book is to collect and harmonize various statutes and doctrines relating to the general subject of the realization of claims by a creditor from the property of his debtor.

This object is a commendable one, and the author has little rivalry in the attempt that he has made. Books on fraudulent conveyances, for instance, say little or nothing about bankruptcy. Even the largest books on bankruptcy have very fragmentary and inadequate treatment of the general subject of

fraudulent conveyances; yet a lawyer is compelled when a case comes before him to have in mind all the principles which may affect his client's right of realizing his claim from the assets of his debtor.

Not only is the plan of the book a good one, but the execution is in many respects commendable. The author is evidently practically familiar with the subject of which he treats in its most modern applications. He is not content merely to repeat the statements of eminent judges; he has sought to distil in his own mind definite results from a multitude of authorities. An author who attempts to do this is perhaps quite as likely as another to make slips, and Mr. Glenn's book is not free from them.

The size of the book prohibits an attempt to be exhaustive in the citation of authorities, and as the decisions selected for citation are generally well chosen, it is not a fair ground of criticism that numerous other cases might also have been cited. There are, however, statements which the author makes without qualification, as everywhere true, which in fact do not find universal acceptance, e.g., "In every State, statutes make a judgment a lien upon the debtor's land from the moment of the proper entry of the judgment" (page 60). This is not true in the New England States. "In all of our States are statutes requiring the registration of (a) chattel mortgages, where, as is generally the case, possession of the mortgaged property is not delivered to the mortgagee, and (b) contracts of conditional sale, where, as is always the case, that being part of the bargain, possession of the stipulated chattels is delivered to the vendee" (page 164). In Pennsylvania there is no such statute as to chattel mortgages, and in a number of States there is no such statute in regard to conditional sales. On page 231 the author assumes that a trustee under a general assignment nowhere has power to attack a fraudulent conveyance of his assignor, but in some jurisdictions he is allowed to do so.

Other slips of the author which we have noticed are the following: The well-known case of *Edwards v. Harben*, 2 T. R. 587, which the author criticizes more than once, he regards as involving a conditional sale with possession in the grantee. In fact, the bill of sale referred to in the case was given as a chattel mortgage (generally called in England a conditional bill of sale). Possession was in the mortgagor or grantor. On page 154 one might infer from the author's language that an unpaid vendor could reclaim goods sold and delivered. The essential requirement of fraud he inadvertently fails to state.

In his discussion of the English law of the present day on mortgages of after-acquired property he assumes that the well-known case of *Holroyd v. Marshall*, 10 H. L. C. 191, is still law in England; whereas the English law was long since changed by statute. On page 344, speaking of the Bankruptcy Act, as amended in 1910, he inadvertently states that to make a preference voidable, the preferred creditor must have had reasonable cause to believe that the preference was "intended" instead of would be effected.

In the discussion on pages 399 and following, there seems some confusion between unmaturing and contingent claims. That there is doubt in regard to the provability of any unmaturing debt absolutely owing, cannot be admitted.

On some points also which are open to difference of opinion, we should not agree with the author's conclusions, but throughout, the book is helpful and based on original and thoughtful work.

S. W.

THE INDIVIDUAL DELINQUENT. By William Healy. Boston: Little, Brown, and Company, 1915. pp. xvi, 830.

This remarkable work is perhaps the first great expression of the new epoch upon which criminology is now entering. It is also a culmination. Like so many other modern sciences, criminology has undergone a bewilderingly

rapid development since the day when Lombroso first deflected attention from "crime" to "the criminal." It was not long before Lombroso's dramatic abstraction was divided into *classes* of criminals. These divisions were effected along anthropological, biological, ethical, or psychological lines, according to the background from which the classifier approached his task. Professor Healy makes no such classification, but, as the title of his book implies, concentrates attention on the *individual* delinquent. In this study, which has involved the most painstaking investigation into hundreds of cases, he has brought to bear the knowledge and equipment of all the several related sciences. The investigation consists of a thorough inquiry into the history of the offender's family, his development, his environment, and an examination as to his physical and mental condition. The latter consists largely in the tests used for the feeble-minded which already show a promising development through adaptation to more complex and varied individuals. With the complete record before him, Professor Healy then isolates the causes of the delinquency.

It is in this last process that the book is a great step in advance of the earlier works, which contented themselves with a tabulation of the frequency of certain conditions among criminals. It was the older method that gave rise to such one-word theories of crime, as epilepsy, poverty, or impacted teeth. By sifting out the *causative* factors alone, however, and tabulating them, Professor Healy has given us a sounder basis for generalization. Also, by confining most of his attention to the juvenile offenders, he has got very close to the beginnings of crime. Among the many interesting things that Professor Healy's figures tend to show is that there is no inheritance of a criminal instinct. Mental defects, however, are inherited in great numbers of cases, and it is this inheritance, coupled with defective environment, that is a great source of crime. The author has given us a great pioneer book on the genetics of crime, and it is to such work that society must look for guidance in its endeavor to stop crime at the source.

Furthermore, by carefully selecting the causative factors in each individual delinquent, it then becomes possible to recommend a rational mode of treatment, either with a view to curing the delinquency, or to protecting society against the incurables. Indeed, as a psychiatrist, Professor Healy is chiefly interested in this opportunity. Such work should be made part of every criminal court in the land. It is perhaps difficult to bring it into harmony with the common-law method of conducting a legal duel between the offender and a heavily handicapped State, — the penalty of losing having been more or less irrationally determined beforehand. Certainly, in theory at least, the methods of Professor Healy have no place in a system born of a mediæval need of public peace and security, and reared in a dread of all magisterial discretion. But the criminal law has grudgingly made room for a little science in the case of juveniles and prisoners suspected of mental aberration, and has allowed some individualization through the indeterminate and cumulative sentences. However, wholehearted coöperation has not yet come, and in the old system the new method must remain a juristic misfit. A fresh start in the theories of the criminal law is badly needed. But since it is obviously impossible to legislate a new mode of thinking, the change can only come by bringing the legal profession in touch with criminal science. The course in Penology at Harvard is a splendid, if belated, start. Were such courses more general, there is little doubt that the common law, by reason of its remarkable fecundity for legalistic white lies, could again extend itself to meet modern needs.

BARTOLUS ON THE CONFLICT OF LAWS. † Translated into English by Joseph Henry Beale, Royall Professor of Law in Harvard University. Cambridge: Harvard University Press. pp. 86.

Bartolus, *lucerna juris*, the greatest figure of the school of Commentators or Post-Glossators of the fourteenth century, was compelled, as a necessary part of the great task undertaken by that school, — the creation of a true common law, out of the materials furnished by the Corpus Juris, the Gloss, and local customs and statutes, — to consider problems of Conflict of Laws. The relationships of the Italian city states, because of an expanding commercial development, were becoming closer and more intimate. Contracts were entered into in one city to be performed in another. Property, both movable and immovable, was frequently in the ownership of citizens of other cities. Inter-marriages were frequent. Crimes and delicts were committed by strangers. Some solution of the juristic problems arising out of such conditions was imperative. The work of Bartolus was of authority for centuries and has value for us to-day. Probably to him rather than to any one else is due the first clear recognition of the principle that the *lex loci* governs the validity of the legal act: a contract or a testament; that the law of the place of performance controls as to all consequences arising from neglect or delay in performance; that the *lex fori* controls in matters of procedure and remedy; and that the law governing a delict is the law of the place where the delict occurred. Bartolus also recognized and took account of the distinction between laws operating only within the territory and laws which might have operation outside, a distinction of which so much was made in later continental writings on the Conflict of Laws.

The translation of those portions of Bartolus' Commentary on the Code relating to the Conflict of Laws was well worth doing, and, so far as it can be determined without a comparison with the original, it seems to have been thoroughly well done. The book, issued upon the six hundredth anniversary of Bartolus' birth, is, in appearance as well as contents, worthy of the occasion.

E. R. J.

LEGAL PRINCIPLES OF PUBLIC HEALTH ADMINISTRATION. By Henry Bixby Hemenway, M.D. Chicago: T. H. Flood & Co. 1914. pp. xxxvi, 859.

As everyone knows, the statutes and ordinances as to public health have vastly enlarged the actual scope of government. Hence this book. It will be valuable to health boards and health officers; for it gives in popular form the doctrines of law on their powers and liabilities. Among the topics covered in the part devoted to general principles are the relation of health administration to the three departments of government, — the police power, due process of law, nuisance, the relations of the nation and the states, and liability for the contracts and torts of health boards and health officers. A discussion of special topics follows, covering quarantine, licenses, water, sewage, garbage, pure food and drug regulation, industrial regulation, school inspection, and eugenics. Thus it is obvious that the author takes a wide and useful view of his subject, and bears in mind the practical needs of health boards and health officers. Even the lawyer will find it convenient to have in one volume the doctrines and citations which are usually scattered among books on Contracts, Torts, Agency, Public Officers, Municipal Corporations, and Constitutional Law. Quite apart from the lawyer's possible practical use of the volume is the pleasure which he may well derive from the author's interesting mode of discussion; for the author has thought about his subject and has not compiled a collection of statutes, ordinances, and extracts from judicial opinions; and, besides, he has caught the lawyer's point of view so well that he thoroughly disarms the

hostility with which the lawyer has learned to open books wherein law is dealt with by laymen.

E. W.

THE LAW OF WILLS AND THE ADMINISTRATION OF ESTATES. By William Patterson Borland. Kansas City: Vernon Law Book Company. 1915. pp. xv, 723.

This book is primarily intended for the Western lawyer, for the majority of the citations are from Missouri, Arkansas, Nebraska, Kansas, Oklahoma, Texas, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, and California. Its usefulness depends largely on enabling him to find decisions on the law of wills in his state. The discussion of administration is too brief to be of much assistance in settling an estate. There is a greater need to-day for books on the administration of estates than on wills; and it is, therefore, disappointing to find that Mr. Borland has only devoted two chapters out of thirteen to that important subject. But beyond this we cannot hope that the author's intention "to make this the best one-volume work on the subject" will be realized. In spite of his statement that all the leading cases in this country and in England are included we find notable omissions from the index: *Allen v. Maddock*, 11 Moo. P. C. 427; *White v. Trustees of British Museum*, 6 Bing. 310; *Bibb v. Thomas*, 2 W. B. C. 1043; *Chase v. Kittredge*, 11 Allen 49; *Lacey v. Dobbs*, 63 N. J. Eq. 325. One important topic at least is hardly touched on,—the effect of revocation of probate. The reader is surprised to learn that the doctrine of incorporation by reference is stated (p. 51) as if it were law throughout the United States, though there is a marked dissent in several states and the question is open in others. Nor can we agree with the statement that "The witnesses may sign before the testator if the acts are practically contemporaneous" (p. 61), unless we add "in some states."

J. W.

WHY THE WAR CANNOT BE FINAL. By Albert W. Alderson. London: P. S. King and Son, Ltd. 1915. pp. 31.

THE ACT TO REGULATE COMMERCE AND SUPPLEMENTAL ACTS. By Herbert C. Lust. Chicago: LaSalle Extension University. 1915. pp. vii, 196, 141.

THE LAW OF CARRIERS OF GOODS. By Ralph Merriam. Chicago: LaSalle Extension University. 1914. pp. ix, 180.

THE PRINCIPLES OF EQUITY. By Edmund H. T. Snell. Seventeenth Edition. By H. Gibson Rivington and A. Clifford Fountaine. London: Stevens and Haynes. 1915. pp. xlix, 638.

LIMITATIONS ON THE TREATY-MAKING POWER. By Henry St. George Tucker. Boston: Little, Brown, and Company. 1915. pp. xxi, 444.

THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS. By Harvey Cortlandt Voorhees. Second Edition. Boston: Little, Brown, and Company. 1915. pp. xliii, 287.

THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW. Edited by L. Oppenheim. Cambridge: University Press. 1914. pp. xxix, 705.

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LIABILITIES INCURRED IN THE ADMINISTRATION OF TRUSTS

IN the course of the administration of a trust, the trustee incurs a liability on a contract or in tort or otherwise to one other than the *cestui que trust*. It is the purpose of this article to consider the rights and remedies, legal and equitable, of the person to whom a liability is thus incurred.

In the absence of an express stipulation relieving him from liability,¹ a trustee is personally liable on contracts made by him for the benefit of the trust estate. He may be sued at law and execution may be levied upon his individual property. This is true whether he was acting without authority in incurring the liability, or whether he was acting in accordance with the directions of the will or deed of settlement or under the direction of the court.²

¹ The effect of such a stipulation is considered *infra*, p. 738.

² *Duvall v. Craig*, 2 Wheat. (U. S.) 45 (1817); *Taylor v. Davis*, 110 U. S. 330 (1884); *Hall v. Jameson*, 151 Cal. 606, 91 Pac. 518 (1907); *Bradner Smith & Co. v. Williams*, 178 Ill. 420, 53 N. E. 358 (1899); *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055 (1906); *Koken Iron Works v. Kinealy*, 86 Mo. App. 199 (1900); *Blewitt v. Olin*, 14 Daly (N. Y.) 351 (1888); *Whalen v. Ruegamer*, 123 N. Y. App. Div. 585, 108 N. Y. Supp. 38 (1908); *Dunlevie v. Spangenberg*, 66 N. Y. Misc. 354, 121 N. Y. Supp. 299 (1910); *Mitchell v. Whitlock*, 121 N. C. 166, 28 S. E. 292 (1897); *Fehlinger v. Wood*, 134 Pa. 517, 19 Atl. 746 (1890); *Connally v. Lyons & Co.*, 82 Tex. 664, 18 S. E. 799 (1891); *Wardwell v. Williamson*, 72 Vt. 183, 47 Atl. 786 (1900). See a collection of authorities in 40 L. R. A. N. S. 201.

An executor or administrator who makes a contract for the benefit of the estate is likewise personally liable thereon. WILLIAMS, EXECUTORS, 10 ed., pp. 1417 *et seq.*; WOERNER, AMERICAN LAW OF ADMINISTRATION, 2 ed., §§ 328-356. In many of the cases hereinafter cited the liability was incurred by an executor.

Similarly, a trustee is personally liable for torts committed in the course of the administration of the trust. Thus he is personally liable for injuries resulting from the condition of the trust premises.³ So, too, he is liable for injuries caused by the negligence of an agent employed by him in the course of the administration of the trust.⁴ In employing an agent, the trustee is a principal and not a mere intermediate agent.⁵ Other burdens also, resulting from his holding the title to the trust property, must be borne by the trustee. In the absence of a statutory provision exempting him from such liability, he is liable for unpaid subscriptions to corporate stock and is subject to the statutory liabilities imposed upon stockholders.⁶ Statutes, however, generally expressly provide that trustees shall not be personally subject to liability as stockholders, but the estates or funds in their hands shall be liable.⁷ Such statutes do not in general release from liability trustees who appear on the books of the company to be absolute owners of the stock.⁸ Similarly a trustee is liable for taxes.⁹

³ *Everett v. Foley*, 132 Ill. App. 438 (1907); *O'Malley v. Gerth*, 67 N. J. L. 610, 52 Atl. 563 (1902); *Keating v. Stevenson*, 21 N. Y. App. Div. 604, 47 N. Y. Supp. 847 (1897) (*semble*); *Boyd v. U. S. Mortgage & Trust Co.*, 84 N. Y. App. Div. 466, 82 N. Y. Supp. 1001 (1903) (*semble*); *Moniot v. Jackson*, 40 N. Y. Misc. 197, 81 N. Y. Supp. 688 (1903) (*semble*); *Gillick v. Jackson*, 40 N. Y. Misc. 627, 83 N. Y. Supp. 29 (1903).

⁴ *Ballou v. Farnum*, 9 Allen (Mass.) 47 (1864); *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350 (1895); *Parmenter v. Barstow*, 22 R. I. 245, 47 Atl. 365 (1900) (*semble*); *Sprague v. Smith*, 29 Vt. 421 (1857) (*semble*); *O'Toole v. Faulkner*, 29 Wash. 544, 70 Pac. 58 (1902).

⁵ *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350 (1895); *O'Toole v. Faulkner*, 29 Wash. 544, 70 Pac. 58 (1902). An intermediate agent is not liable for the acts of a sub-agent. *Stone v. Cartwright*, 6 T. R. 411 (1795).

⁶ 1 COOK, CORPORATIONS, 7 ed., §§ 245-246; 1 MACHEN, CORPORATIONS, § 767. The rule is the same as to stock in joint-stock companies. *Mitchell's Case*, L. R. 9 Eq. 363 (1870); *In re Moseley Green Coal & Coke Co., Ltd.*, 4 DeG., J. & S. 416 (1864); *Muir v. City of Glasgow Bank*, 4 App. Cas. 337 (1879).

⁷ LORING, TRUSTEE'S HANDBOOK, 27. See, for example, U. S. REV. STATS., § 5152, providing that "Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liability as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name."

⁸ 1 MACHEN, CORPORATIONS, § 769; *Sherwood v. Illinois Tr. & Sav. Bank*, 195 Ill. 112, 62 N. E. 835 (1902); *Converse v. Paret*, 228 Pa. 156, 77 Atl. 429 (1910). But see *Burgess v. Seligman*, 107 U. S. 20 (1882).

⁹ *LaTrobe v. Mayor, etc. of Baltimore*, 19 Md. 13 (1862); AMES, CASES ON TRUSTS, 2 ed., 279. By statute, taxes are sometimes payable at the place of residence of the

When the trustee has discharged a liability incurred in the due course of the administration of the trust, ordinarily he has a right to be reimbursed.¹⁰ If, however, he was not authorized to incur the liability, he has generally no right to reimbursement.¹¹ Thus, if an executor, or trustee, carries on the business of the testator without authority, he has no right to reimbursement for discharging liabilities in contract or in tort incurred in carrying on the business.¹² But where the trustee has acted in good faith and has in fact enriched the trust estate, he is sometimes allowed reimbursement, not for the full amount he has expended, but for the amount by which the estate has been enriched.¹³ So, too, he has no right to reimbursement if he incurs and discharges a liability for a tort which is the result of his own neglect or wilful wrong and for which he is therefore personally to blame; but he has a right to reimbursement if he was not personally to blame for the commission of the tort.¹⁴ If the trustee has misappropriated assets of the trust estate or has in any other manner committed a breach of trust, so that he is indebted to the estate, his liability to the estate may be set off against his claim for reimbursement.

Normally, the trustee is reimbursed out of the income from the trust estate. In rendering his accounts, he credits himself with the expenditures he has made, and he is not bound to pay over any of the income to the *cestui que trust* until he has been reimbursed. He pays over only the net income. Where the income, however, is not sufficient, he may have reimbursement from the *corpus* of the trust estate. He is not bound to surrender the estate until his claims are satisfied. He has, in other words, a right to reimbursement, and a lien on both the income and the *corpus* of the trust estate to secure that right.¹⁵ His claim therefore takes

cestui que trust and, when the trustee is a non-resident, payable by the *cestui que trust*. See *Watson v. Boston*, 209 Mass. 18, 95 N. E. 302 (1911).

¹⁰ POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1085.

¹¹ *Winslow v. Young*, 94 Me. 145, 47 Atl. 149 (1900); *Loud v. Winchester*, 64 Mich. 23, 30 N. W. 896 (1897).

¹² *Lucht v. Behrens*, 28 Oh. St. 231 (1876); *Parry's Estate*, 244 Pa. 93, 90 Atl. 443 (1914).

¹³ *Ex parte Chippendale*, 4 DeG., M. & G. 19 (1853).

¹⁴ *Benett v. Wyndham*, 4 DeG., F. & J. 259 (1862); *In re Raybould*, [1900] 1 Ch. 199; *In re Hunter*, 151 Fed. 904 (1907).

¹⁵ LEWIN, TRUSTS, 12 ed., 795; *Stott v. Milne*, 25 Ch. Div. 710 (1884); *Livingston*

precedence over the claims of the *cestui que trust* and of the creditors of the *cestui que trust* against the trust estate.¹⁶

The trustee may at the time of the creation of the trust agree with the settlor to forego the right to reimbursement.¹⁷ If the settlor shows an intention to subject a part only of the trust estate to the risk of loss and the trustee accepts the trust under such circumstances he is precluded from claiming reimbursement out of any other assets. Thus it has been held that if a testator leaves a business to his executor or trustee and directs that it be carried on, he presumptively shows an intention to subject to the risk of loss only the assets already employed in the business, and the executor or trustee has no right to reimbursement from any other assets.¹⁸ But this presumption is overcome when the language of the will evinces an intention to subject the whole estate of the testator to the risk of loss.¹⁹

If the trust estate is insufficient to reimburse the trustee who has discharged a liability properly incurred in the administration of the trust, may the trustee obtain his reimbursement from the *cestui que trust* personally? In a number of cases it has been held that he may. When the settlor is himself the *cestui que trust* a contract to reimburse the trustee may easily be spelled out; from the request to the trustee to act as such and to incur liabilities as such, a promise to reimburse him may naturally be inferred.²⁰ But the decisions have gone further and have allowed the trustee reimbursement from the *cestui que trust* personally, even where

v. Newkirk, 3 Johns. Ch. (N. Y.) 312 (1818); Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118 (1889); Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492 (1892).

¹⁶ Williams v. Allen, 32 Beav. 650 (1863); *In re* The Exhall Coal Co., 35 Beav. 449 (1866); Dodds v. Tuke, 25 Ch. Div. 617 (1884); Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492 (1892).

¹⁷ Gillan v. Morrison, 1 DeG. & Sm. 421 (1847). See *Ex parte* Chippendale, 4 DeG., M. & G. 19, 52 (1853).

¹⁸ *Ex parte* Garland, 10 Ves. 110 (1804); Burwell v. Mandeville's Ex'r, 2 How. (U. S.) 560 (1844); Smith v. Ayer, 101 U. S. 320 (1879); Fridenburg v. Wilson, 20 Fla. 359 (1883); Wilson v. Fridenburg, 21 Fla. 386 (1885). Cf. M'Neillie v. Acton, 4 DeG., M. & G. 774 (1853); Lucht v. Behrens, 28 Oh. St. 231 (1876).

¹⁹ Blodgett v. American National Bank, 49 Conn. 8 (1881); Moore v. McFall, 263 Ill. 596, 105 N. E. 723 (1914); Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705 (1889); Davis v. Christian, 15 Gratt. (Va.) 11 (1859).

²⁰ Balsh v. Hyham, 2 P. Wms. 453 (1728); Phené v. Gillan, 5 Hare 1 (1845); *Ex parte* Chippendale, 4 DeG., M. & G. 19 (1853). See Fraser v. Murdoch, 6 App. Cas. 855 (1881).

the latter is not the settlor, and where it would be impossible to spell out any contract.²¹ In *Hardoon v. Belilios*²² a firm of stock-brokers placed certain shares, not fully paid, in the name of the plaintiff, their employee. The brokers subsequently assigned their beneficial interest in the stock to a syndicate which transferred its interest to the defendant. The plaintiff requested the defendant to take the shares out of the plaintiff's name, but the defendant refused. The corporation became insolvent and the plaintiff was compelled to pay several calls on the stock, and brought suit against the defendant to recover the sums he had thus been obliged to pay. The trial court non-suited the plaintiff. It was held by the Judicial Committee of the Privy Council that the non-suit was improper. The court said:

"The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burdens unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negating it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable. . . . Where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee."

This obligation of the *cestui que trust* to reimburse the trustee is one arising on equitable principles out of the relationship between the parties. The profits, if any, go to the *cestui que trust*; the losses, if any, should be borne by him rather than by the trustee, provided the trustee was not to blame for causing the losses. The obligation of the *cestui que trust* to reimburse the trustee is analogous to the obligation of a principal to reimburse his agent, and bears some resemblance to the obligation of a principal to reimburse his surety, although it is held that the obligation of the

²¹ *Hardoon v. Belilios*, [1901] A. C. 118.

²² [1901] A. C. 118.

cestui que trust is not enforceable in an action at law.²³ If there are several *cestuis que trust*, their personal obligation to reimburse the trustee is enforced against them in proportion to their respective interests in the trust estate.²⁴

Of course no one can be made a *cestui que trust* against his will, and if the intended *cestui que trust* disclaims, he cannot be held personally liable;²⁵ but if he accepts the beneficial interest, he cannot, by an assignment, terminate his obligation to indemnify the trustee against claims arising, even though not maturing, while he holds the beneficial interest.²⁶ One who is not *sui juris* cannot be subjected to any personal liability by virtue of his ownership of the beneficial interest.²⁷ It has been held that the trustees of an unincorporated club have no right to reimbursement from the members of the club.²⁸ The reason given by the court was that a club is not an association for gain and that it would be contrary to the understanding of all concerned if the members were to be held to liability beyond the payment of their dues. Doubtless the parties do not contemplate profit or loss; but if there is any profit, it goes to the members and not to the trustees. And why should not the trustees, if they have acted properly in incurring a loss, shift that loss to those for whose benefit they were acting?

As has been shown, the trustee has a right, after he has discharged a liability properly incurred in the administration of the trust, to be reimbursed therefor. But he has a better right than this. He has a right of exoneration, — a right not to be compelled to discharge such a liability out of his own private property.²⁹ In the case of *In re Blundell*,³⁰ the court, Stirling, J., said:

²³ *Sayles v. Blane*, 14 Q. B. 205 (1849). Similarly, a trustee cannot bring an action at law against the *cestui que trust* for compensation for his services. *Hazard v. Coyle*, 26 R. I. 361, 58 Atl. 987 (1904).

²⁴ *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194.

²⁵ *Hardoon v. Belilios*, [1901] A. C. 118, 123 (*semble*).

²⁶ *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194.

²⁷ *Hardoon v. Belilios*, [1901] A. C. 118, 127 (*semble*).

²⁸ *Wise v. Perpetual Trustee Company, Ltd.*, [1903] A. C. 139. See 3 COL. L. REV. 407; 17 HARV. L. REV. 141; 19 L. QUART. REV. 386. Cf. *Stikeman v. Flach*, 175 N. Y. 512, 67 N. E. 1090 (1903), reversing s. c., 58 N. Y. App. Div. 277, 68 N. Y. Supp. 1011 (1901). The trustees are entitled to a reimbursement from the club property. *Minnitt v. Lord Talbot*, L. R. Ir. 1 Ch. 143 (1876).

²⁹ *In re National Financial Co.*, L. R. 3 Ch. 791 (1868); *Hobbs v. Wayet*, 36 Ch. Div. 256 (1887). See also *In re Richardson*, [1911] 2 K. B. 705.

³⁰ 40 Ch. Div. 370 (1888).

"What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made necessary payments . . . but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability. . . . It seems to me, therefore, that a trustee has a right to resort in the first instance to the trust estate to enable him to make the necessary payments to the persons whom he employs to assist him in the administration of the trust estate; that he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he can properly in the first instance resort to the trust estate, and pay those persons whom he has properly employed the proper remuneration out of the trust estate."

He may apply the trust income to the discharge of such a liability. He may use the principal of the trust fund in discharging the liability; he may, if authorized by the will, sell or mortgage a part or the whole of the *corpus* to raise funds wherewith to discharge the liability; or, if not so authorized by the will, he may generally obtain an order from the court giving him such authority; and certainly, he will not be compelled to turn over the estate to the *cestui que trust* while outstanding obligations properly incurred by him as trustee are unsatisfied. He may, indeed, in cases where he is entitled to reimbursement by the *cestui que trust* personally for liabilities discharged, bring a bill in equity to compel the *cestui que trust* himself to discharge such liabilities.³¹ An agent or a surety has a similar right to exoneration which equity will specifically enforce. Similarly, equity will specifically enforce a contract to indemnify. It is immaterial that the trustee is insolvent; he still has a right to be exonerated. If the trustee has died insolvent, his executor may compel the *cestui que trust* to pay the creditor the whole amount of his claim, and not merely the amount of the dividend which the creditor could get out of the trustee's estate.³²

It is clear, then, that the creditor has a right against the trustee, and that the trustee has a right against the trust estate and, in some cases, against the *cestui que trust* personally. Has the creditor himself any right against the trust estate or the *cestui que trust*?

The right of the trustee to exoneration is an asset of the trust-

³¹ *Cruse v. Paine*, L. R. 6 Eq. 641, L. R. 4 Ch. 441 (1869); *Lacey v. Hill*, L. R. 18 Eq. 182 (1874).

³² *Cruse v. Paine*, L. R. 6 Eq. 641, L. R. 4 Ch. 441 (1869).

tee's. The creditor may, by a bill in equity, reach this asset and compel the application of it to his claim against the trustee.³³ Tort creditors, as well as contract creditors, may in this way reach the trust estate.³⁴ In most jurisdictions such a suit does not lie where the debtor has assets which can be reached at law.³⁵ In some cases it is held that the creditor must first obtain judgment against the debtor and have the execution writ returned *nulla bona* before he can bring a bill for equitable execution.³⁶ But equity should not compel the creditor to do a useless thing, and should allow him to sue in equity to reach the debtor's equitable assets without having first obtained a judgment at law against the debtor, where the debtor has no assets which could be reached by execution at law.³⁷ If the trustee resides outside the jurisdiction and has no property within the jurisdiction, it has been held that the creditor may reach and apply the trustee's right to exoneration; the legal remedy against the trustee in such cases is as inadequate as in the case where he is insolvent.³⁸ The creditor can probably, also, when the trustee is insolvent or a non-resident without property in the jurisdiction, reach the trustee's right to be exonerated by the *cestui que trust* personally.³⁹

³³ *Fairland v. Percy*, L. R. 3 P. & D. 217 (1875); *In re Pumfrey*, 22 Ch. Div. 255 (1882); *Moore v. M'Glynn*, [1904] 1 I. R. 334; *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202 (1890); *King v. Stowell*, 211 Mass. 246, 98 N. E. 91 (1912); *Laible v. Ferry*, 32 N. J. Eq. 791 (1880); *Paul v. Wilson*, 79 N. J. Eq. 204, 81 Atl. 835 (1911); *Wells-Stone Mercantile Co. v. Aultman, Miller & Co.*, 9 N. D. 520, 84 N. W. 375 (1900); *Cater v. Eveleigh*, 4 Desaus. Eq. (S. C.) 19 (1809); *Braun v. Braun*, 14 Manitoba 346 (1902).

In *Strickland v. Symons*, 26 Ch. Div. 245 (1884), the court said that the creditor could not reach the trust estate unless the object of the trust was the carrying on of a business. But this seems wrong on principle, and inconsistent with the later English case of *In re Richardson*, [1911] 2 K. B. 705, stated *infra*, p. 733.

³⁴ *In re Raybould*, [1900] 1 Ch. 199; *In re Hunter*, 151 Fed. 904 (1907); *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46 (1893).

³⁵ *Owen v. Delamere*, L. R. 15 Eq. 134 (1872); *Dantzer v. McInnis*, 151 Ala. 293, 44 So. 193 (1907) (*semble*); *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435 (1890); *Stern Bros. v. Hampton*, 72 Miss. 555 (1895).

³⁶ *Blackshear v. Burke*, 74 Ala. 239 (1883). See *Henshaw v. Freer*, 1 Bailey Eq. (S. C.) 311 (1831).

³⁷ In Massachusetts it is not necessary even to show that the trustee is insolvent. *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202 (1890); *King v. Stowell*, 211 Mass. 246, 98 N. E. 91 (1912) (*semble*).

³⁸ *Gates v. McClenahan*, 124 Ia. 593, 100 N. W. 479 (1904); *Norton v. Phelps*, 54 Miss. 467 (1877); *Field v. Wilbur*, 49 Vt. 157 (1876).

³⁹ In *Poland v. Beal*, 192 Mass. 559, 78 N. E. 728 (1906), the *cestuis que trust* ex-

The right of the trustee to exoneration from liability for a debt properly incurred by him in the administration of the trust cannot be reached by the personal creditors of the trustee. In the case of *In re Richardson*,⁴⁰ a leasehold estate was held in trust. At the expiration of the lease the landlord sued the trustee and obtained judgment against him for £711 for rent and damages for breach of covenant. Before the amount was ascertained the trustee was adjudicated a bankrupt. The landlord, by leave of the court, — the question of the ultimate disposition of the fund being reserved, — brought an action against the *cestui que trust* in the joint names of the landlord and the trustee in bankruptcy for a declaration that the *cestui que trust* was bound to indemnify the bankrupt against the £711, and for an order for payment of this sum. The action was compromised, the *cestui que trust* paying £520 to the landlord. An application to the judge in bankruptcy was then made by the landlord to determine who was entitled to the money so recovered. The judge held that it formed a part of the bankrupt's estate and was divisible among his creditors, and ordered the landlord to hand over the money to the trustee in bankruptcy. The landlord appealed and it was held by the Court of Appeal that the appeal should be allowed. In the course of the decision, Buckley, L. J., said:

"This is an obligation to indemnify. How can effect be given to an obligation to indemnify? Only in one of three ways. If B. [the trustee] has paid the money to A. [the creditor], he may get it back from C. [the *cestui que trust*] and may put it into his pocket. If B. has not paid the money to A., but calls on C. to pay the money to A., then if C. pays the money to A., B. is never out of pocket at all. In either of those cases B. is indemnified. But lastly, if B. has not paid the money to A. but calls upon C. to pay the money to him, B., in order that he may pay it to A., then B. is not indemnified if the money is paid, not to A. alone, but to A. and others."

pressly promised the trustee to furnish money to pay for certain property which they requested him to purchase for the benefit of the trust estate. It was held that the person from whom the property was purchased by the trustee could maintain a bill in equity against the *cestuis que trust*. The creditor is here by equitable execution reaching a right to exoneration arising out of an express contract. See an article on "Contracts for the Benefit of a Third Person," by Professor Williston, in 15 HARV. L. REV. 767, 775. The result should be the same when the right to exoneration arises, not out of an express contract, but out of the relationship of the parties.

⁴⁰ [1911] 2 K. B. 705.

The decision seems clearly right. The asset of the trustee is not a right to receive money; it is a right to be saved harmless, to be exonerated by having his liability to the creditor discharged. The obligation of the *cestui que trust* is an equitable obligation, and equity acts specifically. The specific enforcement of the obligation results in payment to the trust creditor, not to the trustee or his private creditors. If the *cestui que trust* should, instead of paying the creditor, put the trustee in funds in order that he might pay the creditor, the trustee would have no right to use the funds in paying his private creditors. In no case, therefore, where the trustee has not paid the trust creditor, can his private creditors reach the trust estate or the *cestui que trust*.⁴¹ Any other result would clearly allow the private creditors of the trustee to make a profit out of the trust. The situation is quite different where the trustee out of his private assets has paid the creditor. His right to reimbursement which arises thereby is a right which any of his private creditors can reach, just as they could have reached those assets if they had moved in time.⁴²

If a testator bequeathes a business to a trustee and directs that he continue to carry it on, the testator's creditors may insist, nevertheless, that the business be not carried on, but that it be wound up and that their claims be paid from the proceeds. If the trustee continues the business without their consent, they may insist on being paid out of the assets so bequeathed, in priority to the claims of persons to whom liabilities have been incurred by the trustee in carrying on the business after the testator's death;⁴³ for debts take precedence over legacies. But if the testator's creditors have consented to the carrying on of the business, they consent to the postponement of their claims to the trustee's right of reimbursement or exoneration; and the creditors whose claims arose after the testator's death and are against the trustee, by proceeding through the trustee's rights of exoneration, obtain priority

⁴¹ *Askew v. Myrick*, 54 Ala. 30 (1875) (*semble*); *First National Bank v. Thompson*, 61 N. J. Eq. 188, 48 Atl. 333 (1901) (*semble*). Compare the remarks of Professor Williston as to the right of a creditor on a promise by a third person to the debtor to pay the debt, in 15 HARV. L. REV. 777.

⁴² See *Mannix v. Purcell*, 46 Oh. St. 102, 19 N. E. 572 (1888).

⁴³ *Re Millard*, 72 L. T. N. S. 823 (1895); *Willis v. Sharp*, 115 N. Y. 396, 22 N. E. 149 (1889) (*semble*); *Morrow v. Morrow*, 2 Tenn. Ch. 549 (1875).

over the testator's creditors.⁴⁴ When a business is carried on by an executor for a short time until it can be sold as a going concern, whether the testator's creditors have consented or not, the executor has a right of indemnity for liabilities incurred by him, and is entitled to priority over the testator's creditors; and through the executor's right, the persons to whom he has incurred such liabilities have priority over the testator's creditors.⁴⁵

This derivative right of the creditor against the *cestui que trust* and the trust estate, through the trustee, is available only when and to the extent that the trustee has a right to exoneration. When the liability was not properly incurred by the trustee in the administration of the trust, the trustee has usually no right to exoneration and the creditor has no right through him against the estate;⁴⁶ but where the trustee acted in good faith and did benefit the estate, he has a right to exoneration to the extent of the value of the benefit, and to that extent the creditor can recover against the estate.⁴⁷ Where the trustee has a right to exoneration only out of a part of the trust estate, the creditor can reach only that part of the estate.⁴⁸ If the trustee is in default to the estate, his claim to exoneration, like his claim to reimbursement, is reduced by the amount that he is indebted to the estate, and the creditor's right against the estate is reduced accordingly; and if the amount of the trustee's indebtedness exceeds the amount of the creditor's

⁴⁴ *Ex parte* Garland, 10 Ves. 110 (1804); *Dowse v. Gorton*, [1891] A. C. 190; *In re* Hodges, [1899] 1 I. R. 480 (1899); *In re* Frith, [1902] 1 Ch. 342.

⁴⁵ *Wright v. Beatty*, 2 Alberta 89 (1909).

⁴⁶ *Farmers' & Traders' Bank v. Fidelity & Deposit Co.*, 108 Ky. 384, 56 S. W. 571 (1900); *Bauerle v. Long*, 187 Ill. 475, 58 N. E. 458 (1900); *Lucht v. Behrens*, 28 Oh. St. 231 (1876); *Tuttle v. First Nat. Bank*, 187 Mass. 533, 73 N. E. 560 (1905); *Dunham v. Blood*, 207 Mass. 512, 93 N. E. 804 (1911); *Welsh v. Davis*, 3 S. C. 110 (1871).

⁴⁷ *Thomas v. Provident Life & Trust Co.*, 138 Fed. 348 (1905); *Deery v. Hamilton*, 41 Ia. 16 (1875); *In re* Estate of Manning, 134 Ia. 165, 111 N. W. 409 (1907); *De Concilio v. Brownrigg*, 51 N. J. Eq. 532, 25 Atl. 383 (1893); *Stillman v. Holmes*, 9 Oh. N. P. N. S. 193 (1909). But see *Hallock v. Smith*, 50 Conn. 127 (1882). For the Scotch law, see MENZIES, TRUSTEES, 2 ed., 227.

⁴⁸ *Ex parte* Richardson, 3 Madd. 138 (1818); *Ex parte* Garland, 10 Ves. 110 (1804); *Cutbush v. Cutbush*, 1 Beav. 184 (1839); *Burwell v. Mandeville's Ex'r*, 2 How. (U. S.) 560 (1844); *Pitkin v. Pitkin*, 7 Conn. 307 (1829) (*semble*); *Wilson v. Fridenburg*, 21 Fla. 368 (1885); *Laible v. Ferry*, 32 N. J. Eq. 791 (1880); *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705 (1889) (*semble*); *Lucht v. Behrens*, 28 Oh. St. 231 (1876).

claim, the creditor cannot hold the trust estate at all.⁴⁹ If there are two trustees, and one is in default but the other is not, and is not in any way responsible for the default, the latter is entitled to exoneration and the creditor can reach the trust estate through his right to exoneration.⁵⁰

Is the creditor without remedy where the trustee is insolvent and has no right to exoneration? Is his only right against the *cestui que trust* or the trust estate a derivative right, a right existing only when and to the extent that the trustee has a right to exoneration? Does he ever have any direct right against the *cestui que trust* or the trust estate?

Nothing is better settled than that the trustee is not an agent of the *cestui que trust*. Where the fact that the trustee was contracting for the estate was known to the third party, the *cestui que trust* cannot be held as a principal.⁵¹ Where the fact that the trustee was contracting for the estate was not known to the third party, the *cestui que trust* cannot be held as an undisclosed principal.⁵² Similarly it is well settled that the *cestui que trust* is not liable, as principal, for the torts of the trustee, committed in the course of the administration of the trust.⁵³ Similarly the *cestui que trust* is not liable for unpaid subscriptions to stock; nor is he subject to statutory liability thereon.⁵⁴ One in whom title to property is vested may, however, be an agent. The person holding the legal title for another is always, in the broad sense of the term, a trustee of the property so held; but he is in addition an agent, when he

⁴⁹ *In re Johnson*, 15 Ch. Div. 548 (1880); *In re Evans*, 34 Ch. Div. 597 (1887); *In re British Power, etc. Co.*, [1910] 2 Ch. 470; *In re Morris*, 23 L. R. Ir. 333; *Hewitt v. Phelps*, 105 U. S. 393 (1881); *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202 (1890) (*semble*); *King v. Stowell*, 211 Mass. 249, 98 N. E. 91 (1912) (*semble*); *Clopton v. Gholson*, 53 Miss. 466 (1876); *Norton v. Phelps*, 54 Miss. 467 (1877) (*semble*); *Wilson v. Fridenburg*, 21 Fla. 386 (1885); *Dantzler v. McInnis*, 151 Ala. 293, 44 So. 193 (1907) (*semble*); *Wells-Stone Mercantile Co. v. Aultman, Miller & Co.*, 9 N. D. 520, 84 N. W. 375 (1900) (*semble*).

⁵⁰ *In re Frith*, [1902] 1 Ch. 342.

⁵¹ *Taylor v. Davis' Adm'r*, 110 U. S. 330 (1884) (*semble*); *Dantzler v. McInnis*, 151 Ala. 293, 44 So. 193 (1907) (*semble*); *Truesdale v. Philadelphia, etc. Ins. Co.*, 63 Minn. 49, 65 N. W. 133 (1895); *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 75 N. W. 911 (1898); *Manhattan Oil Co. v. Gill*, 118 N. Y. App. Div. 17, 103 N. Y. Supp. 364 (1907); *Gates v. Avery*, 112 Wis. 271, 87 N. W. 1091 (1901).

⁵² *Everett v. Drew*, 129 Mass. 150 (1880).

⁵³ *Falardeau v. Boston Art Students' Ass'n*, 182 Mass. 405, 65 N. E. 797 (1903).

⁵⁴ AMES, CASES ON TRUSTS, 2 ed., 279.

acts under the supervision and control of the person for whom he holds the property. If he is an agent of the beneficial owner of the property, the latter may be held on contracts and for torts, as principal.⁵⁵ If there are several beneficial owners and a business is carried on under their supervision, they may be liable as partners.⁵⁶ But it is universally agreed that a trustee as such is not an agent of the *cestui que trust* and cannot render the *cestui que trust* personally liable as a principal, either at law or in equity. The *cestui que trust* personally can be reached by the creditor only indirectly, only when and to the extent that the trustee has a right of exoneration. Has the creditor ever any direct right against the trust estate?

The creditor may, as has been said, sue the trustee at law and obtain a judgment against him personally, and levy on his individual property. But he cannot, any more than an individual creditor of the trustee, levy on the trust estate.⁵⁷ Moreover, he cannot sue the trustee "as trustee" in an action at law and levy on the trust estate.⁵⁸ The common-law rule is that, although an executor is liable "as executor" in an action at law, when sued on an obligation created by the testator, a trustee is not liable in an action at law "as trustee." The only judgment at law against a trustee is *de bonis propriis*.⁵⁹ According to the common-law rule, the words "as trustee" in the writ and declaration are treated as

⁵⁵ So when one holds stock under the direction and control of another, the latter is liable as the "real owner" of the stock. 1 COOK, CORPORATIONS, 7 ed., § 249; 1 MACHEN, CORPORATIONS, § 767; *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162 (1907).

⁵⁶ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (1914); *Wright v. Railroad*, 151 N. C. 529, 66 S. E. 588 (1909). See *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355 (1913), and cases therein cited.

⁵⁷ *Jennings v. Mather*, [1902] 1 K. B. 1; *Zehnbar v. Spillman*, 25 Fla. 591, 6 So. 214 (1889); *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87 (1904); *Moore v. Stemmons*, 119 Mo. App. 162, 95 S. W. 313 (1906); *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238 (1901).

⁵⁸ *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238 (1901). Cf. *Bauerle v. Long*, 187 Ill. 475, 58 N. E. 458 (1900).

In Georgia by statute the trust estate may be reached in an action at law. GA. CODE (1911), § 3786; *Greenfield v. Vason*, 74 Ga. 126 (1884); *Sanders v. Houston, etc. Co.*, 107 Ga. 49, 32 S. E. 610 (1899); *Cottingham v. Equitable, etc. Co.*, 114 Ga. 940, 41 S. E. 72 (1902). See also ALA. CODE (1907), § 6085; CONN. GEN. STATS. (1902), § 739.

⁵⁹ *DuVall v. Craig*, 2 Wheat. (U. S.) 45 (1817); *Brackett v. Ostrander*, 126 N. Y. App. Div. 529, 110 N. Y. Supp. 779 (1908).

surplusage and the action proceeds against the trustee personally.⁶⁰ It would be unfair to the *cestui que trust* to deprive him of his beneficial interest in the trust estate without an opportunity to be heard. Whether or not the trustee properly incurred the debt, and whether or not he has a right to indemnity, the trust estate cannot be reached by the creditor in an action at law. Can the creditor ever, except through the trustee's right of exoneration, reach the trust estate by a suit in equity?

The trustee may be authorized, by the will or other instrument creating the trust, to incur the indebtedness and to mortgage or pledge the trust estate or a part of it as security therefor. If he does create a mortgage or pledge, undoubtedly the creditor may enforce it, and that, too, whether or not the trustee is insolvent, and regardless of the state of the account between the trustee and the *cestui que trust*.⁶¹ The result is the same where the court has power to and does authorize a mortgage or pledge of the estate.⁶²

It is held in a number of cases that if the trustee is unwilling to make himself liable, he may contract in such a way as to exclude personal liability. If he signs the contract "T, trustee," or "T, as trustee for the X estate," or even in the name of the "X estate by T, trustee," he is held personally liable, the words showing his trusteeship being treated merely as *descriptio personae*.⁶³ But if

⁶⁰ *Hampton v. Foster*, 127 Fed. 468 (1904); *Odd Fellows' Hall Ass'n v. McAllister*, 153 Mass. 292, 26 N. E. 862 (1891). In some jurisdictions the words "as trustee" in the writ or declaration are not treated as surplusage; and if the trustee is liable only personally a suit against him "as trustee" will be dismissed. *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238 (1901); *Scheibeler v. Albee*, 114 N. Y. App. Div. 146, 99 N. Y. Supp. 706 (1906); *Parmenter v. Barstow*, 22 R. I. 245, 47 Atl. 365 (1900).

⁶¹ *Gilbert v. Penfield*, 124 Cal. 234, 56 Pac. 1107 (1899); *Iowa L. & T. Co. v. Holderbaum*, 86 Ia. 1, 52 N. W. 550 (1892); *Roberts v. Hale*, 124 Ia. 296, 99 N. W. 1075 (1904); *Packard v. Kingman*, 109 Mich. 497, 67 N. W. 551 (1896); *New York Life Ins. & T. Co. v. Conkling*, 159 N. Y. App. Div. 337, 144 N. Y. Supp. 638 (1913).

⁶² *In re Bellinger*, [1898] 2 Ch. 534; *Neill v. Neill*, [1904] 1 I. R. 513; *Townsend v. Wilson*, 77 Conn. 411, 59 Atl. 417 (1904); *Warren v. Pazolt*, 203 Mass. 328, 89 N. E. 381 (1909).

As to the power of a trustee to mortgage or pledge, see *Smith v. Ayer*, 101 U. S. 320 (1879); *Tuttle v. First Nat. Bank*, 187 Mass. 533, 73 N. E. 560 (1905); *Gibney v. Allen*, 156 Mich. 301, 120 N. W. 811 (1909); *First Nat. Bank v. Nat. Broadway Bank*, 156 N. Y. 459, 51 N. E. 398 (1898); *PERRY, TRUSTS*, 6 ed., § 768.

⁶³ *Muir v. City of Glasgow Bank*, 4 App. Cas. 337 (1879); *Duvall v. Craig*, 2 Wheat. (U. S.) 45 (1817); *Taylor v. Davis' Adm'r*, 110 U. S. 330 (1884); *Hall v. Jameson*, 151 Cal. 606, 91 Pac. 518 (1907); *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101 (1867); *Rosenthal v. Schwartz*, 214 Mass. 341, 101 N. E. 1070 (1913); *McGovern v. Bennett*,

he signs "as trustee but not individually," or "as trustee but not otherwise," then he is not personally liable.⁶⁴ In a recent English case it was said that if he is not bound, no one is bound, and it was held, therefore, that the provision that the trustee should not be personally liable was repugnant and void.⁶⁵ But this view was later disapproved,⁶⁶ and in this country it has been held that effect should be given to the provision and that the trustee is not personally liable.⁶⁷ In such case, is the estate liable? Such a contract, it is held, creates a charge on the trust estate enforceable in equity by the creditor against the trust estate. To the extent that the trustee has power to incur the debt he has power to charge the estate therefor.⁶⁸ Since the claim of the creditor on such a contract is a claim directly against the trust estate, and not merely a right to proceed through the trustee, it is immaterial whether the trustee is indebted to the estate or not. To give the creditor a

146 Mich. 558, 109 N. W. 1055 (1906); *Koken Iron Works v. Kinealy*, 86 Mo. App. 199 (1900); *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70 (1895); *Whalen v. Ruegamer*, 123 N. Y. App. Div. 585, 108 N. Y. Supp. 38 (1908); *Dunlevie v. Spangenberg*, 66 N. Y. Misc. 354, 121 N. Y. Supp. 299 (1910); *Roger Williams Nat. Bank v. Groton Mfg. Co.*, 16 R. I. 504, 17 Atl. 170 (1889); *Wardwell v. Williamson*, 72 Vt. 183, 47 Atl. 786 (1900).

⁶⁴ *Thayer v. Wendell*, 1 Gall. (U. S.) 37 (1812); *Glenn v. Allison*, 58 Md. 527 (1882); *Snow & Leather Nat. Bank v. Dix*, 123 Mass. 148 (1877); *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87 (1904) (*semble*); *Packard v. Kingman*, 109 Mich. 497, 67 N. W. 551 (1896) (*semble*); *Brackett v. Ostrander*, 126 N. Y. App. Div. 529, 110 N. Y. Supp. 779 (1908).

⁶⁵ *Watling v. Lewis*, [1911] 1 Ch. 414. See also *Furnivall v. Coombes*, 5 M. & G. 736. And see *In re Robinson's Settlement*, 46 L. J. 785 (1911), which was reversed by the Court of Appeal on another ground. s. c. [1912] 1 Ch. 717. Cf. *Williams v. Hathaway*, 6 Ch. Div. 544 (1877), where there was a limitation on, but not a total exemption from, personal liability.

⁶⁶ *In re Robinson's Settlement*, [1912] 1 Ch. 717, 728. See also 133 L. T. 250.

⁶⁷ See cases cited, *supra*, n. 64.

⁶⁸ *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326 (1892); *Noyes v. Blakeman*, 6 N. Y. 567 (1852); *New v. Nicoll*, 73 N. Y. 127 (1878) (*semble*); *O'Brien v. Jackson*, 167 N. Y. 31, 33, 60 N. E. 238 (1901) (*semble*); *Fowler v. Mutual Life Ins. Co.*, 28 Hun (N. Y.) 195 (1882); *Wadsworth, Howland & Co. v. Arnold*, 24 R. I. 32, 51 Atl. 1041 (1902). See *Bushong v. Taylor*, 82 Mo. 660 (1884). Cf. *Bank of Topeka v. Eaton*, 100 Fed. 8 (1900), affirmed s. c. 107 Fed. 1003, 47 C. C. A. 140 (1901).

In four states it is expressly provided by statute that "a trustee is a general agent for the trust property. . . . His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." CAL. CIV. CODE, § 2267; MONT. CIV. CODE, § 3020; S. D. CIV. CODE, § 1642; N. D. COMP. LAWS, 1913, § 6305.

right against the estate it is necessary only that the trustee acted properly in incurring the debt.⁶⁹

When, however, the trustee makes a contract for the benefit of the trust estate whereby he does not purport to bind the trust estate, but binds himself, has the creditor any right against the trust estate except through the trustee? In general it is clear that the trust estate is not liable for the contracts⁷⁰ or torts⁷¹ of the trustee, although made or committed in the due course of the administration of the trust. But it is held in a few states that if the debt was properly incurred by the trustee and if the estate was enriched thereby, the creditor may recover against the estate to the extent of the enrichment when the trustee is insolvent or is not within the jurisdiction, even though the trustee is in default to the estate and hence has no right of exoneration.⁷² The theory on which a recovery is allowed is that unless a recovery is allowed the estate

⁶⁹ There is another possible theory on which the trust estate may be reached by the creditor, where the trustee has made a contract "as trustee but not otherwise." It might be held that the meaning of the contract is that, although the trustee is to be liable on the contract, the creditor agrees not to levy upon his private assets, but to rely solely on his right to exoneration. On this theory the right of the creditor against the trust estate is not direct, but is derivative, and is dependent upon, and limited to the extent of, the trustee's right to exoneration. See *Clack v. Holland*, 19 Beav. 262 (1854); *King v. Stowell*, 211 Mass. 246, 251, 98 N. E. 91 (1912).

⁷⁰ *Farhall v. Farhall*, L. R. 7 Ch. 123 (1871); *Taylor v. Crook*, 136 Ala. 354, 34 So. 905 (1902); *Etowah Min. Co. v. Wills Valley Min. & Mfg. Co.*, 143 Ala. 623, 39 So. 336 (1904); *Austin v. Munro*, 47 N. Y. 360 (1872); *United States T. Co. v. Stanton*, 139 N. Y. 531, 34 N. E. 1098 (1893); *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238 (1901); *Mulrein v. Smillie*, 25 N. Y. App. Div. 135, 48 N. Y. Supp. 994 (1898); *Le Baron v. Barker*, 143 N. Y. App. Div. 492, 127 N. Y. Supp. 979 (1911); *Decillis v. Mascelli*, 152 N. Y. App. Div. 304, 136 N. Y. Supp. 573 (1912).

⁷¹ *Moniot v. Jackson*, 40 N. Y. Misc. 197, 81 N. Y. Supp. 688 (1903); *Norling v. Allee*, 37 N. Y. Sup. Ct. 409, 13 N. Y. Supp. 791 (1891), affirmed 131 N. Y. 622, 30 N. E. 865 (1892); *Keating v. Stevenson*, 21 N. Y. App. Div. 604, 47 N. Y. Supp. 847 (1897); *Boyd v. U. S. Mortgage & Trust Co.*, 84 N. Y. App. Div. 466, 82 N. Y. Supp. 1001 (1903); *Parmenter v. Barstow*, 22 R. I. 245, 47 Atl. 365 (1900). But see *Ferrier v. Trepannier*, 24 Can. Sup. Ct. 86 (1895); *Ireland v. Bowman*, 130 Ky. 153, 113 S. W. 56 (1908); *Prinz v. Lucas*, 210 Pa. 620, 60 Atl. 309 (1905).

⁷² *Wylly v. Collins*, 9 Ga. 223 (1851); *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46 (1893); *Sanders v. Houston Guano, etc. Co.*, 107 Ga. 49, 32 S. E. 610 (1899); *Stillman v. Holmes*, 9 Oh. N. P. N. S. 193 (1909); *Manderson's Appeal*, 113 Pa. 631 (1886); *Mathews v. Stephenson*, 6 Pa. 496 (1847); *Yerkes v. Richards*, 170 Pa. 346, 32 Atl. 1089 (1895). Cf. *Mannix v. Purcell*, 46 Oh. St. 102, 147, 19 N. E. 572 (1888); *Field v. Wilbur*, 49 Vt. 157 (1876). See also an article by Louis D. Brandeis, Esq., on "Liability of Trust Estates on Contracts made for their Benefit," in 15 *AMER. L. REV.* 449.

is unjustly enriched. It is true that the defalcation of the trustee may have impoverished the estate, but that is in a separate transaction, for which the creditor is in no way responsible. Although the trustee is not an agent of the *cestui que trust*, he is in a sense an agent of the estate. The situation is therefore different from the case where a bailee makes a contract for the improvement of the thing bailed, in which case the owner cannot be held liable for the incidental benefit.⁷³ The enrichment of the *cestui que trust* is not merely incidental. As a matter of fact, the creditor frequently looks to the solvency of the estate and gives credit on the faith of it. It is true, he relies also on the trustee, and if the trustee is solvent and within the jurisdiction, it is a wise rule to make the creditor pursue him. But when the remedy against the trustee is unavailing, there is no good reason why the estate should profit at the expense of the creditor. In most jurisdictions, however, a direct right against the estate, based on the prevention of unjust enrichment, is denied;⁷⁴ and the creditor's right against the trust estate is dependent on and limited to the extent of the trustee's right to exoneration, and it is necessary in every case to go into the trustee's accounts to ascertain whether he has a right to exoneration, except in the cases where the trustee has expressly mortgaged or pledged, or has expressly charged, the trust estate.

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⁷³ *Cahill v. Hall*, 161 Mass. 512, 37 N. E. 573 (1894).

⁷⁴ *In re Johnson*, 15 Ch. Div. 548 (1880); *In re Evans*, 34 Ch. Div. 597 (1887); *In re British Power, etc. Co.*, [1910] 2 Ch. 470; *In re Morris*, 23 L. R. Ir. 333 (1889); *Hewitt v. Phelps*, 105 U. S. 393 (1881); *Dantzler v. McInnis*, 151 Ala. 293, 44 So. 193 (1907) (*semble*); *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202 (1890) (*semble*); *Clopton v. Gholson*, 53 Miss. 466 (1876); *Norton v. Phelps*, 54 Miss. 467, 471 (1877) (*semble*); *Wells-Stone Mercantile Co. v. Aultman, Miller & Co.*, 9 N. D. 520, 84 N. W. 375 (1900) (*semble*). But if the trustee pays the creditor, using, to the creditor's knowledge, funds of the trust estate, the creditor need not refund, although on an accounting the trustee is subsequently proved to be in default to the estate unless at the time of making the payment the trustee was in default to the estate, and the creditor knew that he was in default. *In re Blundell*, 40 Ch. Div. 370 (1888).

SEPARATION OF INTERSTATE AND INTRA- STATE ACCOUNTS IN FEDERAL AND STATE REGULATION OF RATES

I

WHEN a railroad runs through several states, as almost all the railway systems of our day do, it is unavoidable that in determining the reasonableness of a rate established by one of the states the situation of the whole line must be considered. But there is involved inevitably, if the theory underlying the Constitution of our United States is to be put into practice in state and federal regulation of rates, a separation of intrastate and interstate accounts. Thus, where the intrastate rates of an interstate system are brought in question, one of two plans must be adopted: (1) if the income of the whole line is taken as a basis of inquiry, then the possibility of the other states fixing a similar rate must be considered; (2) or if, on the other hand, this one rate is considered, its reasonableness must be determined by an examination of the capitalization and income of the road within the particular state. It would seem to be clear upon theory that the rates for such transportation as begins and ends in the state must be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business and the value of the property employed in it. The argument to the contrary leads to the conclusion that a state could go beyond the confines of its jurisdiction to the extent of requiring local business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. Although the general rule governing this whole situation which has finally been established may be stated in a few words, the application of it to particular facts by reason of the complication of the accounts involved is a very dif-

ficult matter indeed. But the principle which has been established is sufficiently stated when it is said that the Constitution as interpreted by the Supreme Court of the United States requires that the value of the plant utilized in the intrastate business and the net earnings from such business must both be ascertained in order to determine whether the rates fixed by the state or its Commission are reasonable or confiscatory.

II

In the earlier days the contention was tentatively put forth that such interstate traffic as originates or terminates in the state should be divided upon a mileage basis, and such portion thereof as was done within the state held to be subject to state control, and taken into consideration in determining the reasonableness of the rates fixed by its Commission. This, however, as was appreciated almost from the outset, cannot be done. Commerce which begins in one state and passes into another is not less interstate commerce than that which passes entirely across states. If the different states could regulate that portion of interstate commerce which is moved within their respective limits, there would be left no commerce whatever subject to congressional control. This whole matter has been repeatedly before the Supreme Court of the United States, and since the case of *Wabash, St. Louis & Pacific Railroad v. Illinois*¹ that court has uniformly held that the states cannot fix rates for, or regulate in any manner, that portion of interstate commerce which moves within their territorial limits. Such traffic, throughout its entire course, is subject to the exclusive jurisdiction of Congress, just as commerce between two points wholly within a state is subject solely to the jurisdiction of its authorities, according to the present exercise of powers of government under our system.

All this was first pointed out by Mr. Justice Brewer in the leading case of *Chicago & Northwestern Ry. Co. v. Dey*.²

¹ 118 U. S. 557 (1886).

Until a statutory rate is established what would be a reasonable rate at common law under the Constitution governs, and furthermore what is the reasonable rate in the case of statutory regulation under the Constitution depends upon the significance of that phrase at common law. *Southern Indiana R. Co. v. Railroad Commission*, 172 Ind. 113, 87 N. E. 966 (1909).

² 35 Fed. 866, 881 (1888).

"Defendant's road runs through other states; these states may impose no schedule of rates; part of its business is interstate, and only Congress can limit that; so that from the business elsewhere revenues may be earned which will enable it to make up any deficiency in this state. But the invalidity of this schedule does not depend upon legislation or action elsewhere. If this schedule may be put in force here, a similar one may be in Illinois, Minnesota, and other states through which the company's road runs. For some purposes its property in this state is separate and distinct from its property elsewhere, and out of this property within this state it is entitled to receive some compensation. Robbing Peter to pay Paul has never received judicial sanction."

The other possibility, that the reasonableness of the rate must be determined upon the assumption that the same rate will be adopted throughout the whole system, was that applied in *Steener-son v. Great Northern Ry. Co.*³

"It seems to us that there is scarcely any good reason why a railway system should be divided on state lines at all for the purpose of fixing rates. After rejecting the portions that are not self-supporting, the balance of the system may be considered as a whole; and, in fixing rates in one state, it will only be necessary to see that, if rates are properly adjusted throughout so as to correspond with the rates thus fixed, the whole of such balance of the system will yield a reasonable income on the cost of reproducing the same."

The Supreme Court of the United States, however, adopting the first alternative, has long since insisted upon the separation of the value of the plant used for merely intrastate business, and also of the net earnings from such business, and that upon these bases the reasonableness of the rate fixed by the state shall be determined. In the leading case on this point, *Smyth v. Ames*,⁴ Mr. Justice Harlan said:

"In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the

³ 69 Minn. 353, 396, 72 N. W. 713, 724 (1897).

⁴ 169 U. S. 466, 541 (1898).

See *Philadelphia & R. Ry. Co. v. Interstate Commerce Commission*, 174 Fed. 687 (1909), as to the impropriety of assuming that the cost of moving a particular traffic is the average cost of handling all traffic.

profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business."

III

The observance of this rule depends ultimately upon the practicability of allocating shares in accounts necessarily joint. But this process must be employed in order to determine the cost of any branch of a service rendered by a system, whether it be a question of separating passenger capital from freight, or interstate expense from intrastate. Of any given railroad it may be said that it is entitled to take as gross receipts from its whole business a certain sum, determined by taking its operating expenses, including therewith all proper maintenance charges, and adding to these its fixed charges, that is, a fair return upon a reasonable capitalization. In testing freight rates the standard to be determined is the ton-mile cost. If the sum of the whole amount of freight carried be one hundred million ton-miles, and the gross revenue required from freight be one million dollars, the average rate of freight will be one cent per ton-mile. If there were no other factors in the problem, therefore, a fair proportionate rate would be the ton-mile average charge. But as other factors are always present which cause a difference between commodities with respect to the fair charge for carrying them, a uniform ton-mile rate applied to all cases would not result in reasonable rates.⁵

Evidence must be adduced by the carrier, in attacking the rates fixed by the government, of sufficient force to convince the court that the authorities have acted arbitrarily without reference to cost. Although generally abhorrent to economists, the ton-mile cost basis is well recognized in determining the reasonableness of particular rates. In a recent case ⁶ in the United State Supreme

⁵ *Wood v. Vandalia R. R. Co.*, 231 U. S. 1 (1913).

⁶ *Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 260 (1906).

Court, where the issue was whether a certain rate upon phosphate fixed by a commission was fair to the railroad affected, it was said:

"There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed it may be sometimes necessary to accept as a basis the average rate of all transportation per ton per mile."

Cost is, therefore, an important element in arriving at a judgment with respect to a rate. What weight shall be given to that element, as compared with all the other elements entering into a particular rate, the courts have hitherto been inclined to say, was a matter to be decided in each individual case. Our commissions have not been willing to compel the establishment of rates solely according to mileage; the public benefits, the greater volume of business of carriers warranting lower rates to all, the force of competition and many other potent considerations still outweigh a claim of right founded only on geographic location. And it is true that in themselves ton-mile statistics, reflecting as they do neither car loading, train tonnage, nor car or train mileage, are far from being infallible guides in fixing freight rates. But the drift toward the doctrine that rates should be proportioned according to differences truly existing in the cost of rendering the service is altogether in accordance with the tendency of the modern law of public service against all discriminatory practices.⁷ Indeed, any method of fixing rates which results in disproportionate treatment to different customers asking somewhat different services seems to the writer to be against that fundamental principle of equality which of late years has been held to be violated by discriminatory treatment of different patrons asking substantially similar services.

A schedule of rates in which the respective rates are based upon their proportional cost of the whole service rendered would not fail to-day to meet the approbation of the courts. Not only would

⁷ See *Southern Ry. Co. v. St. Louis H. & G. Co.*, 214 U. S. 297 (1909).

all courts agree that legislation forbidding disproportionality in rates is unconstitutional, but also it is doubtless law that a public-service company may so arrange its schedule as to make each rate yield a reasonable profit for each service above the fair cost, without any question as to the legality of such a course.⁸ And according to the latest opinion in the Supreme Court, a state is held to act in defiance of the constitutional rights of the carrier by imposing a schedule in which the rates in one part of the service are fixed so out of proportion with the rates in another branch as to throw an undue share of the total burden upon the business where the rates are reduced; and it is therefore now clearly established that, if the policy of proportional distribution of the real costs is adopted by the rate-making body, no objection can be made on any grounds whatsoever. The suggestion is sometimes made that a distinction is to be drawn between keeping the different classes of charges proportionate and making the particular rates proportionate. Except for the inherent difficulties of pursuing the inquiry further, the writer perceives no difference in principle between the two; and he has no reason to believe that the distinction has foundation in law.

IV

In accordance with these principles which have now come to be regarded as fundamental, the method of procedure where the cost of conducting intrastate transportation is in question is to find what part of the gross receipts is derived from business within the state, and then find the actual cost of doing that business. This, however, cannot be found by taking a proportionate part of the cost for the entire system, since the cost of moving local freight is greater than that of moving through freight.

"Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible

⁸ See *Seaboard A. L. Ry. v. Florida*, 203 U. S. 261 (1906).

to distribute between the two relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinions of experts familiar with railroad business is competent testimony, and cannot be disregarded. The fact that an exact mathematical computation of the cost is impossible is immaterial; the cost must be found, as best it may, before the reasonableness of the local rate can be determined. There are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible.”⁹

Again, in another way, the error in any such unsophisticated computation will be manifested. Say that the testimony discloses that the operating expenses of the entire system during each of the years were over 60 per cent of the gross receipts. If the cost of doing local business in the state in question will be the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts. Suppose that by the reduction put in force by the Commission of the state the gross receipts will be less by 15 per cent; that would then leave 25 per cent of the gross receipts as what might be called net earnings, to be applied to the payment of interest on bonds and dividends on stock. But further testimony in such a case will invariably show that the cost of doing local business is much greater than that of doing through business. If it should be 85 per cent of the gross receipts, then a reduction of 15 per cent in the gross receipts would leave the property earning nothing more than expenses of operation. These lines of computation show that without a finding as to the cost of doing the local business it is impossible to determine whether the reduced rates prescribed by the authorities of the state were unreasonable or not.¹⁰

To continue the inquiry further, suppose the total value of the property of the railroad within the state is found to be \$10,000,000 and the total receipts both from interstate and local business are \$1,000,000, one half from each. Then, according to the method once confidently asserted but now generally condemned, the value

⁹ Chicago, M. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 178 (1900).

For this purpose, among others, it has recently been established that the Interstate Commission can require carriers engaged in both interstate and intrastate commerce to make full returns of all their accounts of every sort. Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1912).

¹⁰ See the discussion of these facts in the lower court — Chicago, M. & St. P. Ry. Co. v. Tompkins, 90 Fed. 363 (1898).

of the property used in earning local receipts would be \$5,000,000, and the per cent of receipts to value would be 10 per cent. But the error in this method of computation may be seen by supposing the interstate receipts to remain unchanged and letting the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving \$500,000 the company only receives \$100,000. The total receipts for interstate and local business being then \$600,000, the valuation of \$10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers \$8,333,000, and to that engaged in earning local receipts \$1,667,000. But if \$1,667,000 worth of property earns \$100,000 it earns 6 per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as \$8,333,000 and it earned \$500,000, its earning capacity would be the same as that employed in local business — 6 per cent.¹¹

It has, however, generally been recognized that local shipments are much more expensive to handle in proportion to mileage than long-distance shipments. As enumerated in one case in the federal court, this is brought about by three factors: "(1) The shortness of the haul; (2) the lightness of the train-loads; and (3) the expense of billing and handling the traffic."¹² But warning has been given in more recent cases that these differences must not be formulated arbitrarily into a ratio, fixed without reference to particular circumstances, to the effect that the cost of handling intrastate business in comparison with interstate business is in the proportion of 2 to 1. It follows that the one thing to be determined is the separate cost of the interstate business considered by itself. There must be a serious attempt to determine by extrinsic evidence the actual cost of doing intrastate business. At all events, the difference in cost between interstate and intrastate business is such that the percentage of difference between the cost of doing intrastate and interstate business may approximately be estimated with some degree of certainty.

¹¹ See also *In re Arkansas Ry. Rates*, 163 Fed. 141 (1908).

¹² *Northern Pacific Ry. Co. v. Keyes*, 91 Fed. 47, 53 (1898).

V

The state legislation of a few years ago reducing passenger fares could, of course, only apply to intrastate business. To determine whether this reduction was unjustifiable the federal courts found that they were required not only to allocate the respective costs of passenger and freight business, but also to apportion these to the intrastate and interstate business. In one of the leading cases¹³ in this subject, Judge McPherson narrowed the discussion of the basis of apportionment to two theories — the mileage proportion and the revenue proportion. He admitted that neither of these would result in mathematical accuracy; but he insisted that as a practical matter the one which promised to be most satisfactory should be taken as the basis of action. "The theory to now recognize must be either the proportion of earnings, state or interstate, or ton and passenger mile." After reviewing what few cases there are bearing upon the point, notwithstanding that in many of them the greater proportionate cost of local business as compared with through business is pointed out, he said that, although other standards are suggested, the more satisfactory and accurate was "the difference in cost in relation to the revenue."

In a later case¹⁴ this view was elaborately defended by Judge Hook as a working basis for the distribution of all expense incident to railroad business among its revenue yielding operations of every character.

"From the very nature of the case, therefore, some rule must be adopted for charging to each of them their fair and equitable proportion of the common expense. Of necessity it must proceed upon average conditions commonly known or shown to exist, and it argues nothing to say that it does not fully apply to this or that exceptional instance. A general rule based on experienced observation is fair, and what is lost by its application in one place is doubtless gained in another, and an equitable equilibrium maintained. Of those suggested the revenue basis appears to be much more uniform in its adaptability and much

¹³ *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. 317, 348 (1909).

The same principles would seem to apply correspondingly when the constitutionality of the action of the Interstate Commerce Commission in fixing interstate rates is brought in question in the courts. *Missouri K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (1908).

¹⁴ *Missouri K. & T. Ry. Co. v. Love*, 177 Fed. 493, 498 (1910).

less subject to substantial objection. It has been frequently employed. . . . It is the one to which the mind naturally turns in every problem involving the charging of common expense to different departments of a business. When a general or common expense cannot be located, what is more obviously reasonable than to say in the first place the different branches or departments shall bear it according to the value of their products of their gross earnings, and then make due allowance for exceptional conditions if any are perceived?"

The state courts have not unnaturally made such opposition as they could to the working out of a doctrine which almost inevitably in practice means that intrastate rates cannot be reduced so as to range on a parity with interstate rates in cost per mile. In one of the cases in the state courts the problem was discussed in this manner:¹⁵

"The other issue the respondent has likewise failed to meet. Taking the figures from the brief filed by the respondent, we find that the local business alone produces a net earning of at least 3 per cent on the total value of the road in Florida, charging against such income the whole of the taxes. While a state is not permitted to offset local business against interstate business, and to justify low local rates by reason of the profitableness of the latter, yet the interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business. There is, however, a showing that the interstate and foreign business is large, and on a proper showing and a proper proportioning of the service between domestic and foreign business this percentage of net income would be largely increased. Under the scheme of distribution of the earning of the whole road between the several states through which it runs, a ton of Florida oranges or early vegetables is allowed the same credit as a ton of coal in Virginia, and no more."

In a more recent case in one of the state courts the same disposition to kick against the pricks is manifested. The Washington Southern Railway, as it appeared in the evidence in that case, although located wholly within the state of Virginia, was as a

¹⁵ *State v. Atlantic C. L. R. Co.*, 48 Fla. 146, 148, 37 So. 657 (1904).

matter of fact operated almost entirely for interstate business. An order of the State Corporation Commission fixed a maximum passenger rate of two and one half cents a mile for all railroads within the state. At this rate, the plaintiff's intrastate traffic would not make a fair return on the capital invested, but the earnings from interstate business were sufficient to afford a fair return on the total capital. The plaintiff had been voluntarily doing its passenger business in Virginia, both intrastate and interstate, at an average of 2.35 cents per mile. The plaintiff appealed from the order of the Commission. The Virginia Court held ¹⁶ that the unreasonableness of the rate fixed by the Commission was not established. Not willing to deny the settled law that profits in interstate business cannot justify reduction of intrastate rates, the court attempted to make the distinction that the established rule cannot apply where the intrastate business is merely incidental, it being impracticable to determine on what proportion of the whole capital it should earn a fair return. But experience has shown that in any determining rates, capital simultaneously used in both classes of business may in some way or other be apportioned and the respective revenues may likewise be separated by casting some proportion or other. Apparently some such method should have been employed in this case; the result, however, may in the particular case have been right, on the ground that the company did not furnish sufficient data for making any computations. The court relied also on the adoption of similar rates by the railroad; but, except to strengthen the presumption of reasonableness, that cannot affect the constitutionality of the rates ordered by the Commission.

VI

The interblending of operations in the conduct of interstate and local business by interstate carriers is apparent. The same right of way, terminals, rails, bridges and stations are provided for both classes of traffic; the proportion of each sort of business varies from year to year, and indeed, from day to day. Attention was drawn recently to the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return

¹⁶ *Washington So. Ry. Co. v. Commonwealth*, 112 Va. 515, 71 S. E. 539 (1911).

to which the carrier is properly entitled therefrom. Yet, realizing all this, the Supreme Court said in the Minnesota Rate Cases¹⁷

"But these considerations are for the practical judgments of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply."

In the Minnesota Rate Cases there was no substantial dispute as to the amount of the entire revenue assignable to the state or as to its division between interstate and intrastate business, as an examination of the transactions in which the revenue was obtained permitted the making of the requisite apportionments with reasonable certainty. The master to whom the cases were referred then proceeded to ascertain the total expenses incurred by the carrier within the state in moving both interstate and intrastate traffic within its borders from the accounts of the company in a way found satisfactory. This expense was then divided between freight and passenger business according to a process subject to a certain per cent of error. Those items of cost which were directly incurred in each sort of business, and not common to both, were directly assigned; and such items were found to cover about sixty per cent of all expenses. The remaining items, those of common expense, were divided by the master between the freight and passenger business upon the ratio, as to most of them, of revenue train-miles, and as to the other, of revenue engine-miles.¹⁸

The net profits of the interstate and intrastate businesses respectively, passenger and freight, were then found by deducting

¹⁷ 230 U. S. 352 (1913).

But as was pointed out in the Shreveport Case, there are limits even in the present situation to the extent to which the state may by its orders put intrastate rates out of line with interstate rates. *Houston E. & W. T. Ry. Co. v. United States*, 234 U. S. 342 (1914).

¹⁸ Compare to the same effect the working out of the problem in the Missouri Rate Cases, 230 U. S. 474 (1913).

the apportioned share of expense from the apportioned share of revenue, and the rate per cent of the net profit upon the property value assigned to each sort of business was computed. The master concluded that the returns from intrastate transportation were unreasonably low and hence that the rates in question were confiscatory. But, as the Supreme Court pointed out, the validity of this result depended upon the estimate of the value of the property within the state and the apportionments both of value and of expense between interstate and intrastate operations. On the method of appraising property, it was held that certain elements of value largely relied upon by the master were not to be regarded in regulation of rates. And furthermore it was held that, where the constitutional validity of state action is involved, general estimates based upon arbitrary ratios of division between interstate and intrastate business cannot be accepted as adequate proof to sustain a charge of confiscation.¹⁹

Having thus ascertained the share of the expense within the state of the freight and passenger departments respectively, it remained to divide that share, in each case, between the interstate and intrastate business. This apportionment was made by the master, in the case of freight expense, upon what was termed an "equated ton-mile basis"; and in the case of passenger expense upon an "equated passenger-mile basis." That is to say, the master concluded that the cost per ton-mile of doing the intrastate freight business was at least two and one half times the cost per ton-mile of the interstate freight business, and hence he divided the total freight expense according to the relation of the interstate and intrastate ton-miles after the latter had been increased two and one half times. In the case of the passenger expense, he concluded that the cost per passenger-mile in the intrastate business was at least fifteen per cent greater than that in the interstate business, and the total passenger expense was divided upon the relation of passenger-miles after increasing the intrastate passenger-miles fifteen per cent. By the use of equalizing factors, the same result was obtained upon what was called an "equated revenue basis." But the Supreme Court insisted that there was not sufficient justification by any evidence in the record to support the master

¹⁹ See also *Pennsylvania R. R. v. Philadelphia Co.*, 220 Pa. St. 100, 68 Atl. 676 (1908).

in his assumption that the cost of doing intrastate business was so out of proportion to the cost of moving interstate traffic.²⁰

VII

Even in a complicated business such as railway transportation, it ought to be possible to determine the peculiar cost of a particular service with some degree of accuracy. The first difficulty that presents itself, as has been seen, is that the ordinary railroad is engaged in at least two different businesses, the transportation of freight and the transportation of passengers, with their costs intermingled. Now, many of the particular costs of moving traffic can be separated — the wages paid the train crews of freight trains from those paid to the train crews of passenger trains, and the fuel burned by freight locomotives from that burned by passenger locomotives, to take two important items. Moreover, to a certain extent the entire expense of transportation may thus be judged from the sums expended in operation. When the average amount expended in moving typical quantities of a given commodity is known, a standard is established by which it may be seen whether there is not a full return to the railroad of the entire cost attributable to the transportation of these goods. It would be wrong upon any theory to ignore the cost of service, in so far as it may thus be estimated; for to serve some shippers for less than the special costs of serving them would be plainly unfair to other shippers, who would almost inevitably be called upon to make up the deficiency.²¹

When the separable costs of operation have thus been distributed to the different kinds of services rendered, it will be found that from something like $66\frac{2}{3}$ per cent of the total expenditures for which the company should be recouped have been thus accounted for, the percentage depending upon the kind of business in general and the accounting of the company in particular. This determination of nearly two thirds of the average cost for particular services

²⁰ See *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission*, 127 La. 636, 53 So. 890 (1910).

²¹ *Northern Pacific R. R. Co. v. McCue*, 35 Sup. Ct. 429 (1915).

It has been made clear by the Supreme Court for some time that it would not permit the Interstate Commerce Commission to set aside a rate which was giving the railroad only the cost of the service, fairly proportioned. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98 (1909).

with sufficient accuracy gives to the further computation greater reliability, as it greatly diminishes the percentage of error in the total, due to the comparative inaccuracy of the other third. This third consists of the part allocated to the particular business in question of the joint costs of operation, which consist principally of the general expenses and capital charges. Even here some distribution can be made. In so far as the freight management and passenger management are divided between different officials, their salaries may be set apart; and, as to a large extent freight and passenger equipment and terminals are divided, their capital charges may be separated.²²

There remains, however, a very considerable total of joint costs inextricably combined — the salaries of the executive officers and the capital charges upon the roadbed, for example. At this point we are for the first time really driven to computation upon an artificial basis to arrive at some distribution; and obviously this is to be arrived at by striking some proportion. Some students of this subject are content to rest this in all processes of allocation upon respective utilization, dividing these joint costs in the proportion, say, of ton mileage to passenger mileage. But this proportion often throws too great a burden upon the passenger service, the receipts from the passenger train being less than those from the freight train. Other persons maintain that the volume of business done should invariably determine the proportion, dividing these joint costs, say, in the proportion of freight receipts to passenger receipts. But this proportion, in turn, often throws too great a burden upon the freight traffic, the passenger transportation usually receiving more service than its proportion of the total receipts.²³

With due deference to those who have been worried in choosing between these two bases of casting proportions — the revenue basis and the operating basis — the writer would suggest that by compound proportions, utilizing all of the comparative factors which would obviously have a determining influence, the respective errors in the single proportions would be largely compensated and in each case a defensible result would be reached. For example, one significant comparison to ascertain whether relative

²² *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340 (1913).

²³ *Southern Pacific Co. v. Campbell*, 230 U. S. 537 (1913).

injustice is being done one traffic as against another is through the earnings per car. But, where the commodity moves in trainloads, the earnings per train-mile furnish the best criterion. Where the system of operation on a given railroad makes the assignment of two locomotives to the freight train the usual thing while the lighter passenger business is almost invariably handled by one locomotive, it would seem to be fairer to make the comparison in engine miles instead of train miles. And in general it may be said that no simple proportion is sufficient in itself; a compound is more apt to show reasonableness than any of its factors alone. In arriving at the average cost for given transportation, the fairest basis for division of costs will be that taking into account all factors in traffic movement. Whatever factors, or combinations of factors, are employed in determining what should be the proper average rate per ton per mile for the traffic in question, it is obvious that the carriers are entitled to a higher revenue per ton per mile than this average in the case of a given haul which is shorter than the average.²⁴ This is the salient fact in comparing intrastate traffic with its low average haul and interstate traffic with its much higher average haul.

VIII

Even in the latest cases in the Supreme Court dealing with the general problem under discussion, there is still no attempt to work out, as yet, a formula by which the separation of interstate and intrastate accounts in federal and state regulation of rates may be determined. The Supreme Court still does little more for us than to set forth, as if for further consideration, the processes of allocation pursued by the respective litigants, contenting itself with showing that whichever basis be followed the result in the particular case would be the same. This appears in a striking way in an important decision at the present term,²⁵ which to many seems to mark an epoch in the science of rate regulation. The passenger rate there in question went into effect in May, 1907, and was

²⁴ See *Allen v. St. Louis I. M. & So. Ry. Co.*, 230 U. S. 553 (1913).

²⁵ *Norfolk & W. Ry. Co. v. Conley*, 35 Sup. Ct. 437 (1915).

It does not seem possible that cases like *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1 (1907), can stand any longer, holding as they have that a state body can make an order requiring a service to be rendered although considered as local service it results in a loss.

observed by the company until about September, 1909, when, under the terms of the interlocutory injunction in the suit, the charge was increased to two and one half cents a mile. There were, therefore, two fiscal years — June 30, 1907, to June 30, 1909 — during which the company operated its road in West Virginia under the statutory rate. It was found that the intrastate passenger receipts, which had been \$362,997.74 in the fiscal year 1906-07, had fallen, notwithstanding a considerable increase in the number of passengers and passenger mileage, to \$289,943.22 in the fiscal year 1907-08. The passenger expenses for the latter year, estimated according to the method above set forth, together with taxes, amounted to \$275,519.79, leaving a net surplus of \$14,423.43. In the following fiscal year, 1908-09, the intrastate passenger receipts were \$281,864.50. This showed a reduction of \$81,133.24, as compared with the fiscal year 1906-07, although there was a gain over that year of 1,567,374 in the passenger mileage. The expenses attributed by the company to the intrastate passenger traffic, including taxes, for the year 1908-09, amounted to \$283,416.62, thus leaving a deficit in the passenger operations of \$1,552.12.

Evidence was introduced on behalf of the company showing how the results were obtained according to its calculations. It was testified that the intrastate passenger receipts had been carefully ascertained. With respect to the operating expenses, it was said that for many years accounts had been kept for the purpose of separating the expenses incident to the freight and passenger traffic respectively; that about sixty-five per cent of these expenses could be directly assigned, and that the remaining thirty-five per cent, consisting of items common to both sorts of transportation, were divided between the passenger and freight traffic on the basis of engine miles — this being deemed to be more equitable than the train-mile basis originally used, inasmuch as most of the freight was hauled by two engines. In practice, this method was assumed — in accordance with an early computation — to mean that twenty per cent of such items should be assigned to the passenger traffic; this, it was insisted, was a close approximation. Where a division of the road was partly in one state and partly in another, the passenger expenses were apportioned according to track mileage. These expenses within the state having thus been ascertained, they were divided between the interstate and intrastate traffic upon the

basis of the gross passenger earnings; that is, it was assumed that the cost of the interstate and intrastate passenger traffic was the same in relation to revenue.²⁶

The opinion does not undertake to review in detail the methods used on the part of the state to apportion the various common items of expense, that is, after all items capable of direct assignment had been charged to the business to which they related. It is sufficient to say that instead of employing a general factor for the distribution of the outlays common to both kinds of traffic, freight and passenger, the principal witness for the state divided each particular common item according to its character so as to make what was deemed to be a fair apportionment of that item. In this way a variety of methods were employed which the witness described at length. After ascertaining the amount of the total expense considered to be attributable to the passenger traffic within the state, it was divided between the intrastate and interstate business; and for the most part — aside from the expense of passenger stations — the division was made on the basis of passenger miles. This, as the Supreme Court noted, was without resorting to weighting the ratio, as might not improperly be done in cases where the evidence was clear as to the additional cost alleged to be involved in doing intrastate business as compared with hauling interstate traffic.²⁷

"It is apparent," said the Supreme Court, "from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in the intrastate business. It is clear that by the reduction in rates the company is forced to carry passengers, if not at or below cost, with merely a nominal reward, considering the volume of the traffic affected. We find no basis whatever upon which the rate can be supported, and it must be concluded, in the light of the principles governing the regulation of rates, that the state exceeded its power in imposing it." In

²⁶ *Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430 (1912).

²⁷ See the views formerly prevailing in *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649 (1895).

these conclusions it will be noted that the Supreme Court has clearly enough turned its back on its former decisions, which had apparently held it not to be unconstitutional as confiscation to reduce particular rates to a point so low as to be altogether disproportionate to the other rates, so long as the schedule as a whole produced a profit.²⁸

IX

This survey of the situation shows that, although the principles upon which the allocation of accounts should proceed can perhaps be stated so as to be intelligible, the working out of these principles into practice presents difficulties of computation which may to the lawyer seem almost insuperable. But it should be said that to the expert in accountancy, upon whom the lawyer in practice must rely, these are difficulties characteristic of all large operations where the costs involved are largely joint. Difficult though the problems presented may be, it is not more difficult to a lawyer, who can call an accountant to his aid, to estimate, with an approximation sufficient for the purpose, the cost of anything with which the litigation in which he is acting is concerned. It may seem impossible to tell what it will cost a railroad system to carry a ton of steel rails from one point in a state to another, but it is probably no more difficult than to determine what that ton of rails cost the great corporation which produced them. Generally speaking, the regulation of rates has been tending more and more as time goes on to be based upon the cost of service, and it is at last sufficiently clear that proportionality in allocation is the key to the computation. The principles governing the allocation of costs are just about to become clear enough to justify the expectation that the determination by computation in a given state of facts of the range within which a charge should be made, will be the method relied upon in deciding upon the reasonableness of rates. It may perhaps be exasperating to those who are faced with the occasion of making these computations, in the case of the wholly intrastate transportation of an interstate railway system, that the system cannot be treated as a unit in its operations, but must first of all be artificially divided for the purpose of regulation of rates into an interstate carrier and an intrastate carrier. But

²⁸ Such as *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257 (1902).

so long as in our federal system the Congress of the dominant nation chooses to respect punctiliously the jurisdiction of the legislatures of its several states, this rule of our constitutional law will continue to add its complications to a matter already complex enough in itself.

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THE UNIFORM PARTNERSHIP ACT A CRITICISM *

THE conference of commissioners on Uniform State Laws, held at Washington, October 14, 1914, approved the eighth draft of the "Act to Make Uniform the Law of Partnership" (hereinafter called the "Act"), and have recommended it to the state legislatures for adoption. It has already been introduced in the legislatures of Massachusetts, Pennsylvania and other states. The literature on the subject at present available consists in explanatory notes by the learned draftsman, Dr. William Draper Lewis, contained in a pamphlet¹ issued by the Conference, and magazine articles by Dr. Lewis, Professor Samuel Williston and Edmund Bayly Seymour.² As the law of partnership is not a branch of the law with which the legal profession is especially familiar, comment and criticism from every point of view should be of welcome assistance. The writer proposes to call attention to features of the Act not fully dealt with in the articles referred to, but which, it is submitted, should be given consideration by anyone forming a judgment as to the desirability of adopting the Act.

The initial difficulty in undertaking a codification of the law of partnership is involved in the question of the nature of the partnership. Professor James Parsons, commenting on statements of Lindley and Pollock to the effect that the law was ripe for codifica-

* The writer wishes to acknowledge his indebtedness to Professor Brannan, of the Harvard Law School, for helpful criticisms and suggestions during the preparation of this article.

¹ "The Uniform Partnership Act, adopted by the conference of Commissioners on Uniform State Laws, with explanatory notes."

² Lewis, "The Desirability of Expressing the Law of Partnership in Statutory Form," 60 *UNIV. OF PA. L. REV.* 93; Williston, "The Uniform Partnership Act, with Some Remarks on Other Uniform State Laws," 63 *UNIV. OF PA. L. REV.* 196 (Prof. Williston is a member of the Conference's Committee on Commercial Law); Lewis, "The Uniform Partnership Act," *LEG. INTELL.*, Feb. 12, 1915; Seymour, "The Uniform Partnership Act, An Appreciation," *LEG. INTELL.*, Feb. 19, 1915.

tion, said, "They stumble and halt on the very threshold. The definition of partnership breaks them all up. Having no guiding principle to start with, how can they create a system?"³ Ten years later, referring to the English Partnership Act of 1900, he declared that "it ignores the theories by which the cases must be classified. This is codification run mad. The Act leaves out of its purview the theory or fundamental principle which underlies the relation, and by enacting makes inflexible the commonplace details of partnership."⁴

The issue is whether the partnership is in itself a legal person, owning the property and incurring obligations to the partners individually and to third persons, or whether the partners are the only legal persons owning the so-called partnership property and owing the so-called partnership obligations. The former view is called the mercantile or entity theory; the latter, the common-law or aggregate theory.

A legal person is an entity having legal capacity for rights and obligations.⁵ Whether or not the partnership is an entity distinct from its members is a question of fact. It appears that modern jurists are coming to accept the view that any group of human beings united for a common purpose forms a real or natural entity distinct from its members.⁶ Whether or not the partnership entity is or should be treated as a legal person is a legal question. Let us see how the matter has been dealt with by various legal systems. The classical Roman law took cognizance of the contract between the partners under the name of *societas*. Like other contracts it had no effect as to persons not parties thereto, and the partnership was not treated as a juristic person.⁷ Partners could not, unless duly authorized, bind each other to obliga-

³ PARSONS, PARTNERSHIP, 1 ed., Intro. lxiii.

⁴ *Id.*, 2 ed., Pref. viii.

⁵ SALMOND, JURISPRUDENCE, 4 ed., 273; HOLLAND, JURISPRUDENCE, 11 ed., 93, MARKBY, ELEMENTS OF LAW, 6 ed., 84; 1 PLANIOL, DROIT CIVIL, 6 ed., § 362; GAREIS; SCIENCE OF LAW, § 15 (1); GRAY, NATURE AND SOURCES OF THE LAW, 27.

⁶ GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES, Intro. by Maitland, xxvi ff; Machen, "Corporate Personality," 24 HARV. L. REV. 253, 258; MORAWITZ, PRIVATE CORPORATIONS, 1; Pollock, "Has the Common Law Received the Fiction Theory of Corporations?" 27 L. QUART. REV. 219; Bibliography of Foreign Literature in 1 PLANIOL, DROIT CIVIL, 6 ed., § 2015.

⁷ 2 CUQ, INSTITUTIONS JURIDIQUES DES ROMAINS, 441; MOYLE, INSTITUTIONUM, 3 ed., 453.

tions,⁸ and were not liable *in solido*, but could require the creditor to exhaust the joint assets before seeking execution against the separate assets of the partners.⁹ The limited development of partnership law among the Romans was largely influenced by the analogy of *consortium* among co-heirs.¹⁰

During the later middle ages partnership law was developed as a branch of the law merchant. The member of a firm acquired the power to represent his partners and bind them to obligations, to which they were liable *in solido*.¹¹ Modern civil law countries have by their commercial codes made of the partnership something quite different from the old Roman *societas*.

The German commercial code, while not expressly declaring the commercial partnership to be a juristic person, in many ways treats it as such, providing that "A partnership can in its firm name acquire rights and contract obligations, acquire property and other real rights in immovables, can sue and be sued."¹² Gareis, one of the most authoritative commentators on the commercial code, says that its juristic personality is thus recognized,¹³ and Lehmann appears to admit that conclusion with some qualifications.¹⁴ The Swiss code is in this respect similar to the German.¹⁵ The Japanese code, modelled on the German, explicitly declares the partnership to be a juristic person.¹⁶

Though there is no explicit provision in the French code, doctrinal writers agree that the commercial partnership has from time immemorial been recognized as a juristic person,¹⁷ and since 1890 at least all partnerships have been treated by the courts as

⁸ 2 ROBY, ROMAN PRIVATE LAW, 132; MOYLE, INSTITUTIONUM, 3 ed., 454.

⁹ MOYLE, INSTITUTIONUM, 3 ed., 453.

¹⁰ SALKOWSKI, INSTITUTES, § 124; Pound, "Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 603; PARSONS, PARTNERSHIP, 1; 2 ROBY, ROMAN PRIVATE LAW, 128, n. 1.

¹¹ MITCHELL, EARLY HISTORY OF THE LAW MERCHANT, 124-140; also printed as "Early Forms of Partnerships," 3 Select Essays Anglo-American Legal History, 183.

¹² HANDELSGESETZBUCH (1897), § 124, Platt's Translation.

¹³ GAREIS, HANDELSGESETZBUCH, 124 (1). See also Ames's comments in American Bar Association Reports, 1905, 736.

¹⁴ LEHMANN, HANDELSRECHT, 2 ed., 293 ff.

¹⁵ Code des Obligations (1911), § 559.

¹⁶ Commercial Code (1899), §§ 43, 44, Yang's Translation.

¹⁷ 1 PLANIOL, DROIT CIVIL, 6 ed., § 3040; 2 *id.*, § 1956; 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 11 ed., § 1021.

juristic persons.¹⁸ Belgium,¹⁹ Spain,²⁰ Chili²¹ and Mexico²² explicitly declare the partnership to be a juristic person. Italy,²³ Roumania²⁴ and Portugal²⁵ declare it to be a juristic person so far as third persons are concerned. In Russia,²⁶ Scotland²⁷ and Louisiana²⁸ it is treated as a juristic person. The fact that in all of these civil law countries the solution of recognizing the legal personality of the partnership has been reached, although not to be found in the classical Roman law, is strong evidence of its inherent merit and utility in commercial environments not unlike our own, and makes it probable that eventually we shall reach the same result.

The Anglo-American law of partnership is a mixture of the civil law, the law merchant and the common law.²⁹ The earliest treatises were full of citations to civilians,³⁰ and the argument of counsel in a leading English case shows that practitioners also were familiar with the continental writers.³¹ The custom of merchants at first was matter of fact to be found by the jury, not the court. This accounts for the barrenness of early cases in propositions of substantive law.³² Lord Mansfield undertook the task of incorporating the law merchant into the common law, himself making a diligent study of its customs,³³ but unfortunately had few occasions to deal with partnership cases.

The important contributions of the common law to the subject of partnership were joint ownership of property and joint obliga-

¹⁸ 1 PLANIOL, DROIT CIVIL, 6 ed., § 2500; 2 *id.*, § 1957.

¹⁹ Code de Commerce (1873), LX art. 2.

²⁰ Code de Commerce (1885), § 116.

²¹ Code de Commerce (1865), § 348.

²² Code de Commerce (1889), § 90.

²³ Code de Commerce (1882), § 77.

²⁴ Code de Commerce (1887), § 78.

²⁵ Code de Commerce (1888), § 108.

²⁶ Code de Commerce (1893), Tshernow's Translation 21.

²⁷ Bell Laws of Scotland, 6 ed., § 357. English Partnership Act of 1890, § 4 (2).

²⁸ *Stothart v. Hardie*, 110 La. 696, 700, 34 So. 740 (1903).

²⁹ COLLYER, PARTNERSHIP, 1.

³⁰ WATSON, PARTNERSHIP (1794). STORY, PARTNERSHIP (1841).

³¹ *Waugh v. Carver*, 2 H. Bl. 235 (1793).

³² SCRUTTON, ELEMENTS OF MERCANTILE LAW, 13.

³³ 2 CAMPBELL, LIVES OF CHIEF JUSTICES, 407 n.; BIGELOW, CENTRALIZATION AND THE LAW, 16. Mansfield was also well read in the continental writings on mercantile law, as appears from his opinion in *Luke v. Lyle*, 2 Burr. 882 (1759).

tions.³⁴ With these incidents firmly fastened upon it the firm was naturally regarded not as a unit in itself, but as an aggregate of the several partners who were joint owners of all its assets and joint obligors of its liabilities. This is the so-called "common-law" view affirmed by the majority of text writers and courts.³⁵

In dealing with many of the problems arising out of partnership transactions courts have in numerous cases been forced to accept and apply the entity view of the nature of the partnership. As Jessel, M.R., said, "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners."³⁶ A large number of cases can be found in which the courts for the purpose of reaching their decisions avowedly recognize the partnership as a legal person.³⁷ As pointed out by Professor Burdick,³⁸ this conception of the partnership is of long standing, dating back to 1832.³⁹

³⁴ West v. Scip, 1 Ves. 239 (1749); Kendall v. Hamilton, 4 App. Cas. 504 (1879).

³⁵ LINDLEY, 8 ed., 136; BURDICK, 2 ed., 81; 1 BATES, § 171; GILMORE, 117; SHUMAKER, § 53. *Contra*, BEALE'S PARSONS, 1.

Riddle v. Whitehill, 135 U. S. 621, 633 (1890); Percifull v. Platt, 36 Ark. 456 (1880); Chambers v. Sloan, 19 Ga. 84, 85 (1885); State v. Krasher, 170 Ind. 43, 47, 83 N. E. 498 (1907); Faulkner v. Hyman, 142 Mass. 53, 55, 6 N. E. 846 (1886); Tidd v. Rines, 26 Minn. 201, 211, 2 N. W. 497 (1879); Matter of Peck, 206 N. Y. 55, 60, 99 N. E. 258 (1912); Byers v. Schlupe, 51 Oh. St. 300, 314, 38 N. E. 117 (1894); Wiggins v. Blackshear, 86 Tex. 665, 668, 26 S. W. 939 (1894).

³⁶ Pooley v. Driver, 5 Ch. D. 458, 476 (1876).

³⁷ Lacey v. Cowan, 162 Ala. 546, 549, 50 So. 281 (1909); Jones v. Bliss, 45 Ill. 143, 145 (1867); Johnson v. Shirley, 152 Ind. 453, 456, 53 N. E. 459 (1899); Lansing v. Bever Land Co., 158 Ia. 693, 698, 138 N. W. 833 (1912); Cross v. Burlington Nat. Bank, 17 Kan. 336, 340 (1876); Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 187, 121 S. W. 1026 (1909); Woodman v. Boothby, 66 Me. 389, 391 (1876); Robertson v. Corsett, 39 Mich. 777, 784 (1877); Clarke v. Laird, 60 Mo. App. 289, 294 (1894); Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 365, 129 N. W. 548 (1911); Curtis v. Hollingshead, 2 Green (N. J.), 402, 410 (1834); Peyser v. Myers, 135 N. Y. 599, 604, 32 N. E. 699 (1892); Clarke v. Railroad Co., 136 Pa. 408, 413, 20 Atl. 562 (1890); Trumbo v. Hamel, 29 S. C. 520, 526, 8 S. E. 83 (1888); Good v. Jarrard, 93 S. C. 229, 237, 76 S. E. 698 (1912); Pierce's Adm'r v. Twigg's Heir, 10 Leigh (Va.) 406, 423 (1839). The firm has also been referred to as an "entirety." Pratt v. McGuinness, 173 Mass. 170, 172, 53 N. E. 380 (1899); Costello v. Costello, 209 N. Y. 252, 259, 103 N. E. 148 (1913); and as a "quasi-person," Drucker v. Wellhouse, 82 Ga. 129, 133, 8 S. E. 40 (1888).

³⁸ "Some Judicial Myths," 22 HARV. L. REV. 393.

³⁹ Warner v. Griswold, 8 Wend. (N. Y.) 665, 666 (1832).

Of equal interest are decisions not expressly based on the entity view of the nature of the partnership, but not to be reconciled with any other view, and therefore unconsciously applying it. A creditor holding security given by a partner individually is not treated as a secured creditor for the purpose of proving against the insolvent estate of the firm.⁴⁰ Joint creditors of all the partners on obligations not arising out of partnership transactions cannot prove against the firm estate.⁴¹ When a firm signs a note as co-maker with an individual the liability of the firm is that of one person for purposes of contribution.⁴² A bill bearing the names of two firms engaged in two distinct trades, but composed of the same members, is signed by two persons.⁴³ A promissory note given by a firm to a partner or *vice versa*, or by one firm to another having a common member, is not enforceable at law by the original parties because of procedural difficulties, as the same person cannot be both plaintiff and defendant.⁴⁴ But the contract is valid and may be enforced if the procedural difficulty is removed, as by assignment to a third person,⁴⁵ even for the benefit of the assignee. So in the case of a balance of account due from the firm to a partner.⁴⁶ A promissory note given by a firm to a partner may be enforced, though transferred after maturity.⁴⁷ So also even though it be negotiated before maturity, re-transferred and again negotiated after maturity when it would be extinguished if the firm

⁴⁰ *In re Levin Bros' Estate*, 139 Cal. 350, 63 Pac. 335 (1903); *In re Thomas*, 8 Biss. 139 (1878); *In the Matter of Plummer*, 1 Phill. 56 (1841); *Hiscock v. Varick Bank*, 206 U. S. 28 (1906); AMES, CASES ON PARTNERSHIP, 352, n. 4.

⁴¹ *Forsyth v. Woods*, 11 Wall. (U. S.) 484 (1870) (*semble*); *In re Nims*, 16 Blatch. 439 (1879); *In re Weisenburg & Co.*, 131 Fed. 517 (1904).

⁴² *Hosmer v. Burke*, 26 Ia. 353 (1868); *Chaffee v. Jones*, 19 Pick. (Mass.) 260 (1837).

⁴³ *Second Bank v. Burt*, 93 N. Y. 233 (1883).

⁴⁴ *Thompson v. Young*, 90 Md. 72, 44 Atl. 1037 (1899); *Walker v. Wait*, 50 Vt. 668 (1878); 1 AMES, CASES, BILLS AND NOTES, 747, n. 1.

⁴⁵ AMES, CASES ON PARTNERSHIP, 418, n. 4. *Stettheimer v. Tone*, 114 N. Y. 501, 21 N. E. 1018 (1889). So under the New York code the procedural difficulty is removed and actions are brought between firms having common members. *Cole v. Reynolds*, 18 N. Y. 74 (1868); *Schnaier v. Schmidt*, 13 N. Y. Supp. 725 (1891); *Mangels v. Schaen*, 21 N. Y. App. 507, 48 N. Y. Supp. 526 (1897).

⁴⁶ *Bingham v. Tuttle*, 82 Hun (N. Y.) 51 (1894); *Beacannon v. Liebe*, 11 Ore. 443, 5 Pac. 273 (1884).

⁴⁷ *Thayer v. Buffum*, 11 Met. (Mass.) 398 (1846); *Richards v. Fisher*, 2 Allen (Mass.) 527 (1861); *Knaus v. Givens*, 110 Mo. 58, 19 S. W. 535 (1892); *Norton v. Downer*, 15 Vt. 569 (1843); *Sherwood v. Barton*, 36 Barb. (N. Y.) 284 (1862). But see *Cutting v. Daigneau*, 151 Mass. 297, 23 N. E. 839 (1889).

were not personified.⁴⁸ A deposit by a partner with bankers of collateral as security for any sum in which he may become indebted does not authorize its application to a partnership debt.⁴⁹ Two firms consisting in part of the same members are joined in an insolvency proceeding. A non-resident creditor who has proved against one is not barred thereby from later seeking to enforce a claim against the other.⁵⁰ One partnership having joined with natural persons to form a second partnership, and both being insolvent, the assets of the first partnership are to be applied to payment of its own debts, then to payment of those of the second partnership of which it was a member.⁵¹ A sheriff seizing firm property on an execution against a partner is subject to an action of trespass by the firm.⁵²

These and other cases which might be cited indicate the impossibility of consistently applying the common-law theory of partnership. The courts have been consciously or unconsciously tending toward the entity theory, and it is not unreasonable to expect that it may eventually be openly accepted and consistently applied, if the courts are not hindered in so doing by legislation.

Heretofore legislators having occasion to deal with the partnership incidentally, while legislating for some purpose other than that of codifying the law of partnership, naturally treat the partnership as a legal person, the subject of rights and duties like a natural person or corporation. The Sales Act, Sec. 76 (1), the Bills of Lading Act, Sec. 49, the Warehouse Receipts Act, Sec. 58, produced by the Conference of Commissioners on Uniform State Laws, all define "person" for the purpose of the respective Acts as including partnerships. In five states the firm

⁴⁸ *Woodman v. Boothby*, 66 Me. 389 (1876). But see *Easton v. Strother & Conklin*, 57 Ia. 506, 10 N. W. 877 (1881); *Deavenport, etc. v. Green River Dep. Bank*, 138 Ky. 352, 128 S. W. 88 (1910).

⁴⁹ *City Bank Case*, 3 DeG. F. & J. 629 (1861); *In re Starkey, Ex parte Freen*, 2 Glyn & Jameson Bankruptcy Cases, 246 (1827); *Wolstenholm v. Banking Co.*, 54 L. T. R. N. S. 746 (1886); *Bank of Buffalo v. Thompson*, 121 N. Y. 280, 24 N. E. 473 (1890). *Contra*, *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 28 N. E. 281 (1891); *In re Hill & Sons*, 186 Fed. 569 (1911).

⁵⁰ *Pattee v. Paige*, 163 Mass. 352, 40 N. E. 108 (1895).

⁵¹ *In re Knowlton & Co.*, 196 Fed. 837 (1912).

⁵² *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057 (1896); *Haynes v. Knowles*, 36 Mich. 407 (1877); *Garvin v. Paul*, 47 N. H. 158 (1866); *Dunbarrow's Appeal*, 84 Pa. 404 (1877).

may sue or be sued in the firm name.⁵³ In eight it may be sued in the firm name.⁵⁴ Many of the state tax laws treat the partnership as the subject of taxation in the same way that they do the corporation, requiring property to be listed and assessing it in the firm name.⁵⁵ Other statutes, such as Fish and Game Laws,⁵⁶ and Anti-Trust Laws,⁵⁷ treat the partnership as having capacity to commit a crime and be punished therefor. The Federal Bankruptcy Act, for many purposes, treats the firm as a person.⁵⁸

The first draft of the Uniform Partnership Act was prepared by the late James Barr Ames on the mercantile or entity theory, acting under instructions to that effect by the Conference.⁵⁹ A few years later, after Professor Ames' death, when the work had fallen into other hands, the Committee on Commercial Law was persuaded that it was undesirable that the draftsman should be limited to the entity theory and by vote of the Conference the Committee was directed to consider the subject at large as if no such restriction had been placed upon it.⁶⁰ The Committee subsequently requested Dr. Lewis to prepare a draft on the so-called common-law theory.⁶¹

Though the intention of the draftsman was apparently to proceed on the aggregate theory, the question of whether the Act embodies that theory, or any other, depends primarily on the meaning and effect of the several provisions of the Act itself.

⁵³ Iowa Code, § 3468; 5 Howell's Mich. Stats., § 12217 (in Justice's Court); Neb. Rev. Stats., § 7594; Ohio 5 Gen. Code, § 11260; Wyo. Comp. Stats., § 4329.

⁵⁴ Ala. 2 Code, § 2506; Cal. Code Civ. Proc., § 388; 2 Idaho Rev. Codes, § 4112; Minn. Gen. Stats., § 7689; Nev. 2 Rev. Laws, § 5007; Utah Comp. Laws, § 2927; W. Va. Code, § 1976 (in Justice's Court); Wisc. Stats. (1911), § 2612.

⁵⁵ Ark. Kirby Dig. Stats. (1904), § 6903; Ala. 1 Code, § 2108; Ariz. Rev. Stats. (1913), § 4860; Cal. Pol. Code, § 3629 (2) (6); Col. 2 Mill Anno. Stats., § 6231; Idaho 1 Rev. Codes, § 1673; Ill. 5 Stats. Anno., § 9219; Ind. 4 Burn's Anno. Stats., § 10162; Iowa Code (1897), §§ 1313, 1317; Mass. Acts (1909), ch. 490, §§ 27, 41, 43; Mich. 1 Howell's Stats., § 1780; Minn. Gen. Stats. (1913), § 1994; Mont. 1 Rev. Codes, § 2521; Nev. 1 Rev. Laws, §§ 3626, 3629; Neb. Rev. Stats., §§ 6298, 6313; Okla. 2 Rev. Laws, § 7311; Ohio 3 P. & A. Anno. Gen. Code, §§ 5320, 5370; Pa. 5 Purdon's Dig., § 6060; Tex. 3 Civil Stats., § 7509; W. Va. Code (1906), § 744.

⁵⁶ Ohio 1 P. & A. Anno. Gen. Code, § 1462; W. Va. Code Supp. (1909), § 2803 a 4.

⁵⁷ Neb. Rev. Stats., §§ 4029, 4030; Okla. 2 Rev. Laws, §§ 8222, 8225.

⁵⁸ Sec. 1 (19), 5. See cases collected in COLLIER, BANKRUPTCY, 8 ed., 146.

⁵⁹ Report C. U. S. L. (1905), 29; Report Amer. Bar Assn. (1905), 738.

⁶⁰ Report C. U. S. L. (1910), 53; Report Amer. Bar. Assn. (1910), 1044.

⁶¹ Report C. U. S. L. (1911), 149; Report Amer. Bar Assn. (1911), 827.

Sec. 2 contains the definition of "person," to be found in the other Uniform Acts referred to.⁶² Sec. 6 defines partnership as "an association of two or more persons to carry on as co-owners a business for profit."⁶³ The term "association" is ambiguous — an association may or may not be treated as a legal person. The significance of "co-owners" will be discussed later. Sec. 8 is entitled "Partnership Property," and this term is used continually throughout the Act. It implies ownership by the partnership, an entity, distinct from the partners. Sec. 8 (3) enables the partnership to take title to real estate in the partnership name, and such estate can be re-conveyed only in the partnership name.⁶⁴ This would seem to make the partnership as such the subject of rights, and thus a legal person. Cases which have denied the right to take legal title in the partnership name were so decided on the ground that only a legal person can take a title to real estate, and that the partnership is not a legal person.⁶⁵ Sec. 9 (1) makes every partner the agent of the partnership, not of the partners.⁶⁶ Sec. 12 speaks of a fraud by a partner on the partnership, not on his co-partners. If "partnership" means merely "all the partners," this involves a partner's committing a fraud on himself.⁶⁷ Sec. 18 (a) makes it the duty of a partner

⁶² Sec. 2. (Definition of Terms.) "Person" includes individuals, partnerships, corporations, and other associations.

⁶³ Sec. 6. (Partnership Defined.) (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

⁶⁴ Sec. 8. (Partnership Property.) (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

⁶⁵ *Holmes v. Jarrett, Moon & Co.*, 7 Heisk. (Tenn.) 506 (1872); *Tidd v. Rines*, 26 Minn. 201, 211, 2 N. W. 497 (1879); *Riddle v. Whitehill*, 135 U. S. 621, 633 (1889).

⁶⁶ Sec. 9. (Partner Agent of Partnership as to Partnership Business.) (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

⁶⁷ Sec. 12. (Partnership Charged with Knowledge of or Notice to Partner.) Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

to contribute to losses sustained by the partnership,⁶⁸ a duty to the partnership, not to his co-partners, for by Sec. 40 (a) (2) ⁶⁹ the right to contributions is a partnership asset. Sec. 18 (b) requires the partnership, not the co-partners, to indemnify the partner in respect of certain payments.⁷⁰ Sec. 21 makes the partner accountable to the partnership, not to his co-partners.⁷¹ Sec. 35 speaks of the partner's power to bind the partnership, not his co-partners, after dissolution.⁷² These extracts seem more consistent with the entity than with the aggregate view of the nature of the partnership and illustrate the difficulty, if not impossibility, not only of writing and talking about the partnership, but of formulating its rights and obligations without treating it as a legal person.

It may be argued that the section which declares the partners to be co-owners of the partnership property is inconsistent with the recognition of the partnership as an entity.⁷³ The answer to

⁶⁸ Sec. 18. (Rules Determining Rights and Duties of Partners.) (a) Each partner . . . must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

⁶⁹ Sec. 40. (Rules for Distribution.) (a) The assets of the partnership are: (I) the partnership property; (II) the contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

⁷⁰ Sec. 18. (b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

⁷¹ Sec. 21. (Partner Accountable as a Fiduciary.) (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

⁷² Sec. 35. (Power of Partner to Bind Partnership to Third Persons After Dissolution.) (1) If the partnership is not dissolved because it has become unlawful to carry on the business, a partner cannot, after dissolution, bind the partnership to third persons. . . .

⁷³ See definition, Sec. 6, n. 63.

Sec. 25. (Nature of a Partner's Right in Specific Partnership Property.) (1) A partner is co-owner with his partners of specific partnership property holding as tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment

this suggestion is to be found in an analysis of the quality of ownership which under this Act is vested in the partners as co-owners.

"Ownership is merely a collective term denoting the aggregate of several independent rights. It has no meaning other than the sum of its component parts, and it admits of no other definition than an enumeration of these parts. Little difference of opinion exists respecting this enumeration. The rights which collectively constitute ownership are the right to possess, the right to use, the right to the produce, the right to waste, the right of disposition, whether during life or upon death, and the right to exclude all other persons from any interference with the thing owned. In the language of the Civilians, *dominium* includes *jus possidendi*, *jus utendi*, *jus fruendi*, *jus abutendi*, *jus disponendi*, and *jus prohibendi*." ⁷⁴

Let us examine under each of these six heads the ownership of the partner as limited by the Act in this and other sections.

The partner may possess for partnership purposes and for such purposes only.⁷⁵ Even the surviving partner or partners has no right to possess except for a partnership purpose.⁷⁶ As he may rightfully possess only for partnership purposes, his possession when exercised is as agent for the partnership, what the Civilians call "*alieno nomine*." It appears, then, that possession is in the partnership.

As partnership property is permitted to become such for the purpose of being used in the partnership business, it follows that the partnership enjoys the use of partnership property.

Property acquired by the use of partnership funds or otherwise

or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

⁷⁴ HEARN, LEGAL RIGHTS AND DUTIES, 186.

⁷⁵ Sec. 25 (2) (a), see n. 73.

⁷⁶ Sec. 25 (2) (d), see n. 73.

is partnership property.⁷⁷ Hence the produce of partnership property belongs to the partnership to the same extent as does the original fund.

As the use of partnership property within the scope of the firm business is a matter for the partnership to decide, it follows that the partnership may waste, *i.e.*, change the form of the partnership property.

A partner cannot, acting singly, assign any right in specific partnership property;⁷⁸ nothing can be attached or seized on execution by his creditors;⁷⁹ on death his rights pass to the surviving partner.⁸⁰ The partner has no power of disposition except as he is acting as agent for the partnership.⁸¹ The power of disposition is evidently in the partnership.

One partner could not recover against third persons for injury to his rights as co-owner of partnership property. The partnership may exclude the partner from possessing except for partnership purposes.

Of these six rights which constitute ownership it appears that none is held exclusively by the partners, and that the most important, the power of disposition, is held exclusively by the partnership. The nature of co-ownership by the partner under this Act is not such as to exclude the legal personality of the partnership, but on analysis appears rather to be in harmony with that theory than with any theory which denies the legal personality of the partnership. The right of ownership vested in the partner is no more than nominal, and it does not materially impair the ownership of partnership property by the partnership entity.

The conclusion is that while the Act does not explicitly adopt either the entity or aggregate view of the nature of the partnership, it ought to be very difficult for an open-minded court carefully analyzing the whole Act to hold that a partnership is not vested

⁷⁷ Sec. 8. (Partnership Property.) (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

⁷⁸ Sec. 25 (2) (b), see n. 73.

⁷⁹ Sec. 25 (2) (c), see n. 73.

⁸⁰ Sec. 25 (2) (d), see n. 73.

⁸¹ Sec. 9 (1), see n. 66.

with rights and obligations, and therefore a person before the law. But mistrust of codification and the habit of endeavoring to construe any statute so as not to change the common law may lead those courts which conceive that the partnership is not a legal person at common law to deny that it is made one by this Act, though in particular instances they will, as they have done in the past, treat it as if it were a legal person in order to accomplish justice unattainable in any other way. It seems likely that in matters not expressly covered by any provision of the Act, and which depend upon the nature of the partnership, different results will be reached by different courts, and so we shall not attain the uniformity sought for by the Act.

The most important matter in which this lack of uniformity can be foreseen is in regard to the rights of creditors to set aside dispositions of partnership property whereby they are hindered or delayed.⁸² At least four situations may arise, which are not provided for by the Act, which turn on the nature of the partnership, and as to which there is conflict among the state and federal decisions to such extent that it is impossible to say where is the weight of authority.

(1) The firm being insolvent applies its assets, or part of them, to pay a debt of the partners not a partnership debt.⁸³

(2) The firm being insolvent applies its assets or part of them to the payment of separate debts of one or more partners.⁸⁴

⁸² See W. H. Cowles, "The Firm as a Legal Person," 57 CENT. L. J. 343.

⁸³ This has been held valid in the following cases: *Victor v. Glover*, 17 Wash. 37, 48 Pac. 788 (1897); *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170 (1887) (*semble*); *Bernheimer v. Rindskopf*, 116 N. Y. 428, 22 N. E. 1074 (1889); *Farwell v. Huston*, 151 Ill. 239, 37 N. E. 864 (1894); *Carver Gin & Machine Co. v. Bannon & Co.*, 85 Tenn. 712, 4 S. W. 831 (1887); *Couchman's Adm'r v. Maupin*, 78 Ky. 33 (1879) (*semble*).

Contra, *Cron v. Cron's Estate*, 56 Mich. 8, 22 N. W. 94 (1885); *Hilliker v. Francisco*, 65 Mo. 598 (1877); *Brownlee v. Lobenstein*, 42 S. W. 467 (Tenn. Ch. App., 1897).

⁸⁴ Held valid in the following cases: *Boyd v. Arnold*, 103 Ark. 105, 146 S. W. 118 (1912); *Ellison v. Lucas*, 87 Ga. 223, 13 S. E. 445 (1891) (*semble*); *Hargodine & McKettrick Dry Goods Co. v. Belt*, 74 Ill. App. 581 (1897); *Smith v. Smith*, 87 Ia. 93, 54 N. W. 73 (1893); *Old Nat. Bank v. Heckman*, 148 Ind. 490, 47 N. E. 953 (1897); *Kincaid v. Nat. Wall Paper Co.*, 63 Kan. 288, 65 Pac. 247 (1901); *Goddard Peck Grocery Company v. McCune*, 122 Mo. 426, 25 S. W. 904 (1894); *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835 (1889) (*semble*); *Stahl v. Osmers*, 31 Ore. 199, 49 Pac. 958 (1897); *Sigler v. Knox County Bank*, 8 Oh. St. 511 (1858); *Wiggins v. Blackshear*, 86 Tex. 665, 26 S. W. 939 (1894); *Fitzpatrick v. Flannagan*, 106 U. S.

(3) The firm being insolvent transfers its assets to a partner.⁸⁵

(4) The firm being insolvent divides its assets among the partners.⁸⁶

Cases holding these transactions valid appear to proceed on the ground that there is no firm entity known to the law, that the property is that of the partners, that the obligations are those of the partners, that each partner as against his co-partner has a contractual right to have the firm assets applied to firm liabilities, that this right which is called "partner's equity" may be released, waived or transferred, and the creditor whose rights are merely

648 (1882); *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310 (1887); *Sargent v. Blake*, 160 Fed. 57 (1908).

Contra, on the ground that equity takes jurisdiction over a general assignment, *Bartlett v. Meyer-Schmidt Grocer Co.*, 65 Ark. 290, 45 S. W. 1063 (1889); on the ground that such an act is fraudulent, *Pritchett v. Pollock & Co.*, 82 Ala. 169, 2 So. 735 (1886); *Keith v. Funk*, 47 Ill. 272 (1868); *Patterson & Co. v. Seaton*, 70 Ia. 689, 28 N. W. 508 (1886); *Collier v. Hanna*, 71 Md. 253, 17 Atl. 1017 (1889); *Clark-Jewell-Wells Co. v. Tolsma*, 151 Mich. 561, 115 N. W. 688 (1908); *Bannister v. Miller*, 54 N. J. Eq. 121, 32 Atl. 1066 (1895); *James v. Vanzandt*, 163 Pa. 171, 29 Atl. 879 (1894) (*semble*); *Bedford v. McDonald*, 102 Tenn. 358, 52 S. W. 157 (1899); *Goodby v. Cary*, 16 Fed. 316 (1883): on the ground that it is unlawful to destroy the derivative right of creditors worked out through the so-called partner's equity, *Bank v. Durfey*, 72 Miss. 971, 18 So. 456 (1895).

⁸⁵ Held valid in the following cases: *In re Suprenant*, 217 Fed. 470, 472 (1914) (*semble*); *Howe v. Lawrence*, 9 Cush. (Mass.) 553 (1852) (insolvency not apparently known to firm); *Russell v. McCord*, Fed. Cas. 12,157 (1878); *Reese & Heylin v. Bradford*, 13 Ala. 837 (1848); *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565 (1890); *Armstrong v. Fahnestock*, 19 Md. 58 (1862); *Sanchez v. Goldfrank*, 27 S. W. 204 (Tex. Civ. App. 1894).

Contra, *Conroy v. Wood*, 13 Cal. 626 (1859); *Schleicher v. Walker*, 28 Fla. 680, 686, 10 So. 33 (1891) (*semble*); *Franklin Sugar Refining Co. v. Henderson*, 86 Md. 452, 38 Atl. 991 (1897) (on the ground that partners cannot destroy derivative right of creditors); *Roop v. Herron*, 15 Neb. 73, 17 N. W. 353 (1883) (on the ground that the firm as a legal person is the owner of the assets); *Bulger v. Rosa*, 119 N. Y. 459, 465, 24 N. E. 853 (1890) (*semble*); *Conaway's Adm'rs v. Stealey*, 44 W. Va. 163, 28 S. E. 793 (1897); *Saloy v. Albrecht*, 17 La. Ann. 75 (1865); *In re Denning*, 114 Fed. 219 (1902); *In re Terens*, 175 Fed. 495 (1910) (interpreting terms of instrument of transfer as retaining "partner's equity"); *Amundson v. Folsom*, 219 Fed. 122 (1914) (actual intent to hinder creditors found as a fact).

⁸⁶ Held valid: *Sackett v. Rumbaugh*, 45 Fed. 23, 33 (*semble*); *Allen v. Center Valley Co.*, 21 Conn. 130 (1851); *Bates v. Collender*, 3 Dak. 256 (1883); *Lee v. Bradley Fertilizer Co.*, 44 Fla. 787, 33 So. 456 (1902); *Davis v. Smith*, 113 N. C. 94, 18 S. E. 53 (1891); *Singer Nimick & Co. v. Carpenter*, 125 Ill. 117, 17 N. E. 761 (1888). *Contra*, *In re Head*, 114 Fed. 489 (1902), and also cases in second paragraph of preceding note. None of these lists purports to be complete.

derivative cannot prevent it, that it is not fraudulent for the partners to apply their property, including firm property, to the payment of their separate debts, but at most a preference, that generally partners may do as they please with the firm assets while not yet in bankruptcy unless they act in "actual fraud;" and what actual fraud is one cannot say, but it would seem, according to these courts, that it is not actual fraud to pay separate debts or to put the firm property in such a situation that separate creditors will have a priority therein, although firm creditors are thereby hindered. It is submitted that these results are unsatisfactory and at variance with the accepted principles of right and justice which give priority in firm assets to firm creditors whenever the assets fall into the hands of a court of equity or bankruptcy for distribution. This seems to have been the opinion of the draftsman, for in an earlier draft of the Act the matter was thoroughly and satisfactorily dealt with by a section entitled "Fraudulent Conveyances."⁸⁷

The section on Fraudulent Conveyances does not appear in the present draft because, as the writer is informed, it was felt that it pertained rather to another branch of the law and was out of place in a partnership code. But there would be little left of the present Act if everything pertaining to agency, property, bankruptcy, evidence⁸⁸ and other recognized departments of the law

⁸⁷ Seventh Draft. Sec. 21. (Fraudulent Conveyances.) (1) Every conveyance or encumbrance of partnership property by a partner made or given voluntarily and without a present and fair consideration to the partnership, as distinguished from a consideration to the individual members, when the partnership is or will be thereby rendered insolvent or in contemplation of insolvency, shall be void as against the partnership creditors, except as to purchasers in good faith and for a present fair consideration.

(2) Every conveyance or encumbrance of partnership property, every obligation incurred and every judicial proceeding taken by any partner, with intent to hinder, delay, or defraud any partnership creditor, or other person, of his demand against the partnership or which will have this effect, is void as against the partnership creditors, except as to purchasers in good faith and for a present fair consideration.

(3) Under the provisions of this section every conveyance or encumbrance of partnership property by any partner, to any partner made when the partnership or the assignee partner is insolvent, is void as against the partnership creditors, whether such insolvency be known to the partners or not.

⁸⁸ Sec. 3. (Interpretation of Knowledge and Notice.) (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

were removed.⁸⁹ The question under discussion turns on the nature of the partnership and the relation of its assets to the partnership and to the partners, which are decidedly questions of partnership law. In omitting to deal with this subject, the Act leaves unanswered questions as to which there has been probably greater conflict of authority than on any other point of partnership law, and the Act herein signally fails of its avowed purpose to make uniform the law of partnership.

It does not seem to the writer that Sec. 41⁹⁰ disposes of the

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice,

(a) States the fact to such person, or

(b) Delivers through the mail, or by other means of communication, a written statement of such fact to such person or to a proper person at his place of business or residence.

⁸⁹ See Seymour's comment on this. "The Uniform Partnership Act, An Appreciation," *LEG. INTELL.*, Feb. 19, 1915.

⁹⁰ Sec. 41. (Liability of Persons Continuing the Business in Certain Cases.) (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b) either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

matter, for that applies only in case the business as a whole is assigned to a partner, or to a third person or persons who assume the debts and continue the business. Moreover under this Act not only are new creditors let in on a parity with the old creditors, but if the assets are assigned to one person, his separate creditors, including those who became such before the assignment, come in on a parity with the creditors of the old partnership. It is therefore submitted that the section on Fraudulent Conveyances which was deleted from the previous draft should be restored to the Act.

One objection which has been made to declaring the partnership a legal person is that such a course would result in confusing it with the corporation. This objection has been especially urged in view of the definition of a corporation contained in several of our state constitutions, whereby the corporation is defined substantially as "any association or joint stock company having any of the powers or privileges not possessed by individuals or partnerships."⁹¹ This objection ought not to deter us from the attempt to draft a scientific code of partnership law, if the law on this subject is to be codified. The fact, if true, that some states would be embarrassed by their constitutions or by other statutes in adopting

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any of the conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

⁹¹ Ala., art. 12, § 241; Cal., art. 12, § 4; Kan., art. 12, § 6; Idaho, art. 11, § 16; La., art. 268; Mich., art. 12, § 2; Minn., art. 10, § 1; Miss., art. 7, § 199; Mo., art. 12, § 11; Mont., art. 15, § 18; N. C., art. 8, § 3; N. D., art. 7, § 144; Pa., art. 16, § 13; S. D., art. 17, § 19; S. C., art. 9, § 1; Utah, art. 12, § 4; Va., art. 12, § 153; Wash., art. 12, § 5.

such a code ought not to deprive other states of the best code that can be drafted. The desirability of framing a code which all states can adopt with the least inconvenience is a consideration to which too much weight can be given. Uniformity is not the only thing to be sought. But whatever the above objection amounts to, it seems that it may be urged against the Act in its present form. The partnership is by this Act empowered to acquire and convey the title to real estate in the partnership name.⁹² This is a power or privilege not heretofore enjoyed by partnerships or individuals.⁹³ The partnership is by this Act made into such an association as to come within the constitutional definition of corporation which has been referred to. It is probably only a corporation for the purpose of being submitted to the provisions regarding corporations contained in these constitutions.⁹⁴ Each state constitution should be examined from this point of view.

In the interests of the title searcher the adoption of the provision contained in Sec. 8 (3) should be accompanied by such amendments of the laws regulating the acknowledgment and registration of deeds as are necessary to make it appear on the record that the person executing the deed in the partnership name is a partner and is authorized to convey.

The partner has under this Act authority to bind the partnership by any act "for apparently carrying on in the usual way the business of the partnership of which he is a member."⁹⁵ This may be taken to mean an act within the apparent course of business as carried on by his particular firm. It has been generally held that not only the course of business of his firm may be relied on as evidence of his authority, but the course of business of other firms in the same locality engaged in the same general line of business.⁹⁶

⁹² Sec. 8. (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

⁹³ *Holmes v. Jarrett, Moon & Co.*, 7 Heisk. (Tenn.) 506 (1872); *Tidd v. Rines*, 26 Minn. 201, 211, 2 N. W. 497 (1879); *Riddle v. Whitehill*, 135 U. S. 621, 633 (1889); 30 Cyc. 431. But see *Byam v. Bickford*, 143 Mass. 31 (1885); *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125 (1905).

⁹⁴ *Great Northern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449 (1899); *Att'y General v. McVichie*, 138 Mich. 387, 389, 101 N. W. 552 (1904). Compare *Keystone Bank v. Donnelly*, 196 Fed. 832 (1912). In Missouri a similar definition of corporation appears in the statutes. 1 Rev. Stats. (1909), § 2963.

⁹⁵ Sec. 9. See n. 66.

⁹⁶ *Woodruff v. Scaife*, 83 Ala. 152, 154, 3 So. 311 (1887); *Standard Wagon Co.*

It is submitted that a narrower rule imposes an undue burden on the third person to learn the habits of the particular firm, and because this Act is susceptible of a narrow interpretation the language of the English Act, "any act for the carrying on in the usual way business of the kind carried on by the firm," should be substituted.

Sec. 16⁹⁷ is believed by the draftsman to overrule *Thayer v. Humphrey*.⁹⁸ In that case there was a holding out of A as partner of B, but no real partnership. The court held that creditors of the ostensible firm were entitled to priority in distribution of the insolvent estate of B, the real sole proprietor of the business. This result was based on the ground of estoppel, and on the authority of *In re Rowland*⁹⁹ and *Ex parte Hayman*.¹⁰⁰ But, as clearly shown by the opinion in the latter case, both these cases rest on the statutory doctrine of reputed ownership,¹⁰¹ which does not

v. Few & Co., 119 Ga. 293, 295, 46 S. E. 109 (1903); *Smith v. Collins*, 115 Mass. 388, 399 (1874); *Buckley v. Wood & Co.*, 4 Pa. Sup. Ct. 391 (1897); *Irwin v. Villiar*, 110 U. S. 499, 505 (1883).

⁹⁷ Sec. 16. (Partner by Estoppel.) (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

⁹⁸ 91 Wis. 276, 64 N. W. 1007 (1895).

⁹⁹ L. R. 6 Ch. App. 421 (1866).

¹⁰⁰ L. R. 8 Ch. Div. 11 (1878).

¹⁰¹ English Bankruptcy Act 1883, Sec. 44.

exist in this country.¹⁰² It is submitted that, while *Thayer v. Humphrey* is unsupportable and ought to be overruled, this Act, in declaring the liability to be joint, does not prevent a court which takes the same views as the Wisconsin court of the effect of the law of estoppel, from, as in that case, distributing the insolvent estate as if there had been a partnership. The law of estoppel still applies under this Act.¹⁰³

Sec. 18 (*h*) empowers the majority to decide a question in the ordinary course of business as to which there is disagreement.¹⁰⁴ No provision is made for cases of even division, as where there are two partners. The decisions are in conflict on this point.¹⁰⁵

While the word "lawful" is omitted from the definition of partnership,¹⁰⁶ we are assured by the draftsman that because unlawfulness is a cause of dissolution,¹⁰⁷ a partnership for a wholly unlawful purpose "is dissolved the moment it is created."¹⁰⁸ While the unlawfulness of the agreement of partnership may well make it unenforceable as between the partners by any legal proceeding, yet it should be recognized in the interests of innocent third persons that a partnership has in fact been created, and such third persons should have the usual rights against the members of the partnership and its assets.¹⁰⁹ Suppose a partnership formed for an entirely unlawful business and one partner without authority from his co-partner orders goods, which might be used for a lawful purpose,

¹⁰² *Harkness v. Russell*, 118 U. S. 663, 669 (1886).

¹⁰³ Sec. 4. (Rules of Construction.) (2) The law of estoppel shall apply under this act.

¹⁰⁴ Sec. 18. (Rules Determining Rights and Duties of Partners.) (*h*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

¹⁰⁵ That the act may be done although the third person knows of the disagreement: *Johnson Clark & Co. v. Bernheim*, 76 N. C. 139 (1887); *Campbell & Jones v. Bowen & Bird*, 49 Ga. 417 (1873). *Contra*, *Dawson v. Elrod*, 105 Ky. 624, 49 S. W. 465 (1899); *Monroe v. Connor*, 15 Me. 178 (1838).

¹⁰⁶ Sec. 6. (Partnership Defined.) (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

¹⁰⁷ Sec. 31. (Causes of Dissolution.) Dissolution is caused: (3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

¹⁰⁸ The Uniform Partnership Act, with explanatory notes, p. 16.

¹⁰⁹ A corporation formed for a wholly unlawful purpose may make valid contracts with innocent third persons. WALD'S POLLOCK ON CONTRACTS, 3d ed. Williston 490, n. 5.

from an innocent third person. Is the latter without remedy save against the person he actually dealt with, and has he no priority over separate creditors in joint assets? Such would seem to be the unfortunate result if the attempted partnership is as a matter of law never in existence. The root of the difficulty is in the conception of the illegal contract as a nullity, instead of as an actual contract subject to a personal defense as between the parties to it.

Notice of dissolution is required in all cases except where the partnership is dissolved because it has become unlawful to carry on the business.¹¹⁰ It is a commendable change to require notice in case of dissolution by death or bankruptcy of a partner, but why not require it in case of dissolution because the business has become unlawful? No provision is made by the Act for such a case, and so the matter is left as at common law. It seems to be assumed that at common law notice is unnecessary in such a case, but the decisions to that effect are, so far as the writer has been able to ascertain, cases of dissolution by reason of war between the two countries wherein members of the firm are resident.¹¹¹ One may well be bound to take notice of so public an event as war, but it seems an injustice in cases where the third person does not know of the foreign residence of a member of the firm with which he believes himself to be doing business, to refuse him a remedy against all members of the firm resident in his own country who might have given him notice. In many other cases of illegality there is no reason for presuming notice. Suppose a partnership is formed for engaging in the liquor business in a city where such a business is licensed. Later the city votes for

¹¹⁰ Sec. 35. (Power of Partner to Bind Partnership to Third Persons after Dissolution.) (1) If the partnership is not dissolved because it has become unlawful to carry on the business, a partner cannot, after dissolution, bind the partnership to third persons by any act which is not necessary to wind up the partnership affairs or to complete transactions then unfinished unless,

(a) Such third person, having had relations with the partnership by which a credit was extended upon the faith of the partnership, has had no knowledge or notice of the dissolution; or

(b) Such third person, not having had business relations with the partnership by which a credit was extended to the partnership, has no knowledge or notice of the dissolution, and the fact of dissolution has not been advertised in a newspaper of general circulation of the place (or of each place if more than one) at which the partnership business was regularly carried on.

¹¹¹ *Griswold v. Waddington*, 16 John. 439 (1819); 30 Cyc. 655, 671.

"no-license" and the liquor business becomes unlawful. One member of the partnership, without the knowledge of his partner, undertakes to continue the business unlawfully and orders goods in the firm name of a third person in a distant state who has dealt with the firm and who has no knowledge of the fact that in the city where the business is carried on the sale of liquor has been forbidden. If no notice of dissolution has been given he should be allowed to hold both partners. It is submitted that an innocent third person should be entitled to notice where the dissolution is due to illegality as much as in any other case, and that the qualification "if the partnership is not dissolved because it has become unlawful to carry on the business" should be stricken out.

In an indirect way, using a double negative, Sec. 35¹¹² makes a retired partner liable on a contract made after his retirement with a third person who has never had any previous dealings with the partnership, if he does not know of the dissolution and if no public notice has been given. The reason for such a rule is that the third person should be allowed to assume that the partner's connection with the firm and liability for its obligations continues unless he has some notice to the contrary. It is an estoppel. If the third person has never been informed of the partner's connection with the firm, no credit is extended in reliance upon his supposed liability, and the reason for holding him liable on a contract to which he is not a party disappears. Accordingly it is generally held that a dormant partner need not give notice of retirement.¹¹³ Some courts refuse to treat him as a dormant partner where the style of the firm name is such as to suggest other partners than those whose names are part of the firm name, *e. g.*, "The X Company," or "A, B & Co." There is a conflict of authority on this point.¹¹⁴ But the cases are agreed upon the proposi-

¹¹² See n. 110.

¹¹³ *Park v. Wooten's Ex'r*, 35 Ala. 242 (1859) (*semble*); *Hornaday v. Cowgill*, 54 Ind. App. 631 (1913); *Nuisbaumer v. Becker*, 85 Ill. 287 (1877); *Gorman v. Davis & Gregory Co.*, 118 N. C. 370, 24 S. E. 770 (1896); *Kelley v. Hurlburt*, 5 Cow. (N. Y.) 534 (1826); *Baptist Book Concern v. Carswell*, 46 S. W. 858 (Tex. Civ. App., 1898); *Vaccaro v. Toof*, 9 Heisk. (Tenn.) 194 (1872); *Bigelow v. Elliot*, 1 Cliff. 28 (1858) (*semble*); *In re Stoddard Bros. Lumber Co.*, 169 Fed. 190 (1909).

¹¹⁴ That notice is necessary: *Goddard v. Pratt*, 16 Pick. (Mass.) 412, 428 (1835); *Elkinton v. Booth*, 143 Mass. 479, 10 N. E. 460 (1887); *Shamburg v. Ruggles*, 83 Pa. 148 (1876); and see *Magill v. Merrie & Bullin*, 5 B. Mon. (Ky.) 168 (1844); *Edwards v. McFell*, 5 La. Ann. 167 (1850); *Deford v. Reynolds*, 36 Pa. 325 (1860). *Contra*,

tion that one who has had no knowledge of the existence of the firm is not entitled to notice in any form.¹¹⁵

Under Sec. 35 it appears that a retired partner is liable on obligations incurred in the firm name after dissolution even though the third person never heard of the firm while he was a member. It is submitted that this change of the law is unwarranted. As no note is made of it in the annotations on this section, it is possibly inadvertent. The section ought to be reconstructed so as to dispense with some of the confusing negatives and affirmatively to impose liability in the absence of knowledge or notice; and in the case of third persons who have had no business relations with the partnership whereby credit was extended to it the necessity for notice should be limited to such third persons as had knowledge of the existence of the partnership.

Sec. 38 (1)¹¹⁶ confers on each partner certain rights as to the application of partnership property after a dissolution. It should be expressly stated that such rights may be enforced by the representative of a deceased partner.

According to the English Bankruptcy Act,¹¹⁷ our Federal Bankruptcy Act,¹¹⁸ and the weight of authority among our states,¹¹⁹ partnership creditors cannot share in the insolvent estate of a partner until his separate creditors are paid in full. For a history of this rule, *Re Wilcox*¹²⁰ and *Robinson v. Security Co.*¹²¹

Grosvenor v. Lloyd, 1 Met. (Mass.) 19 (1840); Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030 (1913); Warren v. Ball, 37 Ill. 76 (1865); Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118, 120 (1850).

¹¹⁵ Puritan Trust Co. v. Coffey, 180 Mass. 510, 62 N. E. 970 (1902); Swigert v. Aspden, 52 Minn. 565, 54 N. W. 738 (1893); Dowzelot v. Rawlings, 58 Mo. 75 (1874); Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 211, 54 N. E. 40 (1899) (*semble*); Cook v. Slate Co., 36 Oh. St. 135 (1880); Benjamin v. Covert, 47 Wis. 375, 385, 2 N. W. 625 (1879) (*semble*); Pratt v. Page, 32 Vt. 13 (1859); EWART, ESTOPPEL, 518.

¹¹⁶ Sec. 38. (Rights of Partners to Application of Partnership Property.) (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. . . .

¹¹⁷ English Bankruptcy Act 1883, § 40 (3).

¹¹⁸ U. S. Bankruptcy Act 1898, § 5 f.

¹¹⁹ 30 Cyc. 551.

¹²⁰ 94 Fed. 84 (1899).

¹²¹ 87 Conn. 268, 87 Atl. 879 (1913).

may be consulted. It is illogical under any theory of partnership, is contrary to the practice in civil law countries,¹²² and as was said from the first by English courts, has nothing to support it but precedent.¹²³ Some of our states have a contrary rule at common law.¹²⁴ Others have, by statutes making joint obligations joint and several, overturned the conventional rule, at least so far as estates of deceased partners are concerned.¹²⁵ It is to be hoped that eventually in all our courts of insolvency the liability of the partner to contribute to the payment of partnership liabilities, correctly described by this Act as a partnership asset,¹²⁶ will be treated as on a parity with his other liabilities for purpose of distribution of his insolvent estate. Meanwhile it is not to be expected that a state such as Connecticut, whose highest court has so recently after the fullest consideration deliberately departed from the conventional rule, will return thereto in order to secure uniformity.

The Act substantially adopts the conventional rule¹²⁷ and provides for payment of claims against the separate estate in the

¹²² Brannan, "The Separate Estates of Non-bankrupt Partners," 20 HARV. L. REV. 588, 592.

¹²³ *Ex parte Clay*, 6 Ves. 813 (1802); *Dutton v. Morrison*, 17 Ves. 193 (1810).

¹²⁴ *Robinson v. Security Co.*, 87 Conn. 268, 87 Atl. 879 (1913); *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 45, 47 Atl. 176 (1900); *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. 502 (1887); *Webb v. Gregory*, 49 Tex. Civ. App. 282, 108 S. W. 478 (1908). This result is reached by statute in Louisiana. *Flower v. Creditors*, 3 La. Ann. 189 (1848). In Kentucky separate creditors share the separate assets until their rate of dividend equals that received by partnership creditors from partnership assets; thereafter both classes of creditors share *pari passu*. *Southern Bank of Kentucky v. Keiser*, 2 Duval, 169 (1865); *Hill v. Cornwell*, 95 Ky. 512, 26 S. W. 540 (1894). This rule is adopted by statute in Georgia. *Johnson v. Gordon*, 102 Ga. 350, 30 S. E. 507 (1897).

¹²⁵ *McLain & Blodgett v. Carson's Adm'r*, 4 Ark. 164 (1842); *Ashby's Adm'r v. Porter*, 26 Gratt. (Va.) 455 (1875); *Freeport Stone Co. v. Carey's Adm'r*, 42 W. Va. 276, 26 S. E. 183 (1896). Similar statutes have been construed as not changing the rule of distribution. *Smith v. Mallory's Ex'r*, 24 Ala. 628 (1854); *Hundley v. Farris' Adm'r*, 103 Mo. 78, 15 S. W. 312 (1890); *Irby v. Graham*, 45 Miss. 425 (1872); *Williams Adm'r v. Bradley*, 7 Oh. Cir. Ct. 227 (1892).

¹²⁶ Sec. 40. (Rules for Distribution.) (a) The assets of the partnership are: I. The partnership property, II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

¹²⁷ Sec. 40. (i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

- I. Those owing to separate creditors.
- II. Those owing to partnership creditors.
- III. Those owing to partners by way of contribution.

following order: (a) those owing to separate creditors; (b) those owing to partnership creditors; (c) those owing to partners by way of contribution. This however introduces several changes into the law as it is established by the weight of authority. (1) A partner who has paid the partnership debts can at present prove for contribution against the insolvent partner's estate and share *pari passu* with his other separate creditors.¹²⁸ Under this Act he would apparently be postponed until all other separate creditors had been paid. (2) At present a partner is not allowed to prove against the insolvent estate of his co-partner for a claim unconnected with the partnership and receive any dividend until all firm creditors have been paid, on the ground that otherwise he would be competing with his own creditors, *i. e.*, the unpaid partnership creditors.¹²⁹ But he is allowed to take as a separate creditor where it would not injure the partnership creditors.¹³⁰ Under this Act a partner may apparently share with the other separate creditors of his insolvent co-partner in any case except when his claim is one for contribution. (3) At present, where there is no partnership estate and no living solvent partner, the partnership creditors are allowed in the majority of the states to share *pari passu* with the separate creditors in the separate estate.¹³¹ As no provision is made for such exceptional case by this Act, it would probably be construed as excluding such exception. The Bankruptcy Act of 1898 has been thus construed.¹³²

Sec. 43¹³³ provides that the right to an account accrues at the

¹²⁸ *Olleman v. Reagan's Adm'r*, 28 Ind. 109 (1867); *Buseby v. Chenault*, 13 B. Mon. 554 (1852); *Payne v. Matthews*, 6 Paige (N. Y.) 19 (1876); *Amsinck v. Bean*, 22 Wall. (U. S.) 395, 403 (1874); *In re Dell*, 5 Sawy. 344 (1878); *Matter of Hirth*, 26 Amer. Bank. Rep. 666 (1911). *Contra*, *Kirby v. Carpenter*, 7 Barb. (N. Y.) 373 (1849).

¹²⁹ *Ex parte Ellis*, 2 Gl. & J. 312 (1827); *Ex parte Maude*, L. R. 2 Ch. App. 550 (1867); *Estate of Bennett*, 13 Phila. 331 (1880).

¹³⁰ No possible surplus for firm creditors in insolvent debtor partner's estate. *Ex parte Topping*, 4 DeG. J. & S. 551 (1865). Insolvent creditor partner's estate sufficient to pay his separate debts, so that whatever additional came to his estate would enure solely for benefit of partnership creditors. *In re Head*, [1894] 1 Q. B. 638.

¹³¹ AMES, CASES ON PARTNERSHIP, 343, n. 2. 30 Cyc. 552.

¹³² *Re Wilcox*, 94 Fed. 84 (1899); *Re Henderson*, 142 Fed. 588 (1906), *aff'd* 149 Fed. 975 (1906); *Re Janes*, 133 Fed. 912 (1904), *certiorari* refused *sub nom.* *MacNabb v. Bank of Le Roy*, 198 U. S. 583 (1904). *Contra*, *Re Green*, 116 Fed. 118 (1902); *Re Conrader*, 121 Fed. 801 (1902); *In re Gray*, 208 Fed. 959 (1913).

¹³³ Sec. 43. (Accrual of Actions.) The right to an account of his interest shall

date of dissolution in the absence of any agreement to the contrary. Under this section the ordinary orderly course of winding up by the liquidating partner might be disturbed at any time by an action brought by the retired partner or the representative of a deceased partner without showing any facts other than a dissolution and the absence as yet of an accounting. The liquidating partner should be treated as a fiduciary, and if he has neglected or refused to perform his duty or acted in any other way adversely to the rights of those to whom it is his duty to account, an action should lie against him as against a trustee under similar circumstances. He should not be subject to interference by the courts while in no way neglecting his duty.¹³⁴ If a court grants an accounting it must in due course make a decree, holding the partner who as a result of the accounting proves to be a debtor to his co-partner or co-partners liable in a certain amount, although some assets of the partnership cannot immediately be exactly appraised, and as to any of the assets the amount of the appraisements may not be realized. Moreover, if the action accrues at once, the Statute of Limitations begins to run, and if assets are received by a partner at a time subsequent to the dissolution by a period longer than the statutory period, there is no enforceable obligation to account for them. There is at present considerable conflict on this point, but Professor Burdick has said, "This holding is correct in principle, that the statute does not begin to run until the partnership affairs have been settled and a balance struck."¹³⁵

The surviving partner should be treated not as a debtor, but as a fiduciary, and this view seems to be embodied in the sections declaring him to be a fiduciary as to benefits received without

accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

¹³⁴ It has been held that the right of action does not as a matter of law accrue on dissolution. *McPherson v. Swift*, 22 S. D. 165, 116 N. W. 76 (1908); *Riddle v. Whitehill*, 135 U. S. 621 (1889); but only after a reasonable time has elapsed, *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826 (1894); *Gray v. Green*, 142 N. Y. 316, 37 N. E. 124 (1894); or an account is stated, *Matthews v. Adams*, 84 Md. 143, 35 Atl. 60 (1896); or an adverse claim has been made by the partner in possession, *Thomas v. Hurst*, 73 Fed. 372 (1896).

¹³⁵ 30 Cyc. 720. Cases showing different rules on this point are collected in 30 Cyc. 719, 721.

consent of co-partners,¹³⁶ and denying his right to possess partnership property except for partnership purposes.¹³⁷ Moreover, the representative of the deceased partner or a retired partner can elect to claim the profits attributable to the continued use of his share, instead of its value at the date of dissolution.¹³⁸ These provisions seem inconsistent with the section under consideration. In a comment on the corresponding section in a previous draft,¹³⁹ the learned draftsman said, "The English Act makes the debt due at the time of dissolution. The provision here drawn is based on the principle that when one person manages property for another nothing is due until an account is stated." Sec. 43 of the Act now recommended by the Conference is obviously drawn on a different principle, but the draftsman does not in his explanatory notes give any reason for the change or make any comment whatever on this section. It is submitted that the provision of the previous draft should be substituted for Sec. 43.

This article has been devoted primarily to a consideration of what are in the opinion of the writer important defects in the proposed Act. The Act contains, nevertheless, many commendable features, which cannot because of lack of space be enumerated.

¹³⁶ Sec. 21. (Partner Accountable as a Fiduciary.) (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

¹³⁷ Sec. 25 (2) (d). See n. 73.

¹³⁸ Sec. 42. (Rights of Retiring or Estate of Deceased Partner when the Business is Continued.) When any partner retires or dies, and the business is continued under any of the conditions set forth in § 41 (1, 2, 3, 5, 6), or § 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by § 41 (8) of this act.

¹³⁹ Draft D. Sec. 50. (Accrual of Actions.) Subject to any agreement between the partners the amount due from the liquidating partner or the surviving partners or the person or partnership continuing the business to the other partners or the representative of a deceased partner in respect to their shares in the partnership is a debt due at the time an account is stated as to all matters covered by the account.

The greater part of the provisions whereby the law is changed or conflicts settled are mitigations of the logical consequences of applying the aggregate theory on which the draftsman has ostensibly proceeded, such as the qualifications of the partner's right in specific partnership property,¹⁴⁰ which would necessarily be implied without express formulation if the entity theory were avowedly adopted. While the Act contains improvements in the law of many states, it is submitted that no state should adopt it without eliminating the defects which have been indicated.

Judson A. Crane.

CAMBRIDGE, MASS.

¹⁴⁰ See n. 73.

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THE PRESENT APPROACH TO CONSTITUTIONAL DECISIONS ON THE BILL OF RIGHTS. — Constitutional decisions significantly demonstrate that "general propositions do not decide concrete cases." But the manner of approach to such general propositions, the rigidity or flexibility which is assumed for their content, *do* decide cases. In 1907 a unanimous Court of Appeals in New York declared unconstitutional a statute prohibiting night work for women, as a denial to women of "equal rights with men."¹ Refusing to be bound by its earlier decisions the same court has now sustained the second attempt of the legislature to prohibit night work by women, sustained it as a protective measure of the state to safeguard the health of its women engaged in industry, and therefore as a measure in the interest of the "general welfare of the people of the state." *People v. Charles Schweinler Press*, 53 N. Y. L. J. 81. In neither opinion is there any dispute as to general principles; nay more, there is no conflict whatsoever between the legal principles applied by the two cases. But the application of the same legal principles to the same statute² produces a complete reversal in result — a result of incalculable importance when translated into terms of wealth and welfare. Evidently, then, we are in the presence of a change of temper in the court, involving a change in the content of familiar legal principles, a change in judgment screened by formal prin-

¹ *People v. Williams*, 189 N. Y. 131, 81 N. E. 778, 20 HARV. L. REV. 653.

² There is a slight difference in detail between the two statutes which the Court, with fine candor, dismissed as irrelevant to the constitutional issue.

ciples, the judgment, that is, "as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."³

At such a period of legislative emphasis in the law as the present, with reasonable likelihood of extension of state activity, such a change of attitude on the part of the highest court in the largest industrial state in the Union would in itself be amply significant to arouse lawyers to inquire as to the implications of such a decision. When, however, the New York court only illustrates a nation-wide phenomenon, such an inquiry, and a professional readjustment to its results, are imperative. The *Schweiner* decision involves, it is submitted, three implications of vital moment to constitutional adjudications, once they become part of the emotional stock as well as the intellectual belief of the profession.

First: Questions as to the constitutionality of modern social legislation are substantially questions of fact. The formulæ of the Bill of Rights do not furnish yardsticks by which the validity of specific statutes can be measured. Concepts like "liberty" and "due process" are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. The legal principles cannot be applied *in vacuo*. In the famous *Ives* case⁴ a great body of industrial and social data gathered by the Wainright Commission, on which the New York legislature acted in passing the workmen's compensation act, was brushed aside as irrelevant to "the purely legal phases of the controversy." In the *Schweiner* case the same court considered at length the data as to the relation of night work to women's health, gathered by the Factory Investigating Committee, upon which the New York legislature based the act in question. Deference to this data was the very foundation of the court's decision on the legal question.

Secondly, and closely following as a corollary, inasmuch as facts are dynamic, constitutional decisions upon which they must be based cannot be static. Conditions change, legislation deals with these changed conditions, and so must the courts. A book like Miss Goldmark's "Fatigue and Efficiency" completely undermines prevalent assumptions as to facts and, thereby, may well destroy the very groundwork of prior judicial decisions. Therefore the doctrine of *stare decisis* has no legitimate application to constitutional decisions where the court is presented with a new body of knowledge, largely non-existing at the time of its prior decision. This was precisely the situation in the *Schweiner* case. The seven years that elapsed between it and the *Williams* case developed an overwhelming mass of authoritative data, and it is by the light of such new knowledge that the justification of legislative action must be determined. Therefore a difference in attitude or result of constitutional decisions very frequently reflects only a corresponding development in the technique, or the new material, of the related social sciences. But frequently the court is left without proper aid as to the

³ This profound observation Mr. Justice Holmes has often given expression to in his writings and decisions: see 10 HARV. L. REV. 457, 466; THE COMMON LAW, 35, 36; *Vegelein v. Guntner*, 167 Mass. 92, 105-106; *Lochner v. New York*, 198 U. S. 45, 76.

⁴ *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431.

existing facts supporting contested legislation, and herein we touch most intimately the responsibility of the profession and especially of legal education. These issues cannot be disposed of as abstract legal questions. Law must be related to the other social sciences. When the New York Court of Appeals refuses to follow the *Williams* case, because "of failure adequately to fortify and press upon our attention the constitutionality of the former law as a health and police measure, and to sustain its constitutionality by reference to proper facts and circumstances," it draws a heavy indictment against the Bar. Undoubtedly the last few years have seen progress. In fact since the *Muller* case,⁵ a new method of presenting constitutional questions to courts has gradually made its way, namely, by pressing home justification for a given statute by an authoritative marshalling of facts directed to the specific subject matter and the specific circumstances of particular jurisdictions.⁶

Thirdly, there is involved a changing realization of the proper scope of the judiciary in the distribution of governmental powers. Of course lip service has always been paid to the fundamental of American constitutional law, that the wisdom or justice of legislative policy is entirely outside the judicial province. But the rule has not always been honored in observance. Its application necessarily has become obscured where issues that involve conflicts of fact — such as the regulation of hours and conditions of employment — are treated as detached principles of law. But the matter lies deeper than that. We needed to be reminded authoritatively that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's 'Social Statics.'" Here, as elsewhere, the emphasis makes the song. In the *Williams* case there is clearly discernible a feeling on the part of the court that it is its duty to serve as a barrier against the current tendency of collectivist legislation.⁷ A different note is struck when the same court in one of its recent decisions,⁸ of which the *Schweiner* case is the culmination, quotes approvingly the admonition of the Supreme Court, "it must be remembered that legislatures are ultimate guardians of the liberty and welfare of the people in quite as great a degree as the courts."⁹ The admonition is profoundly important, particularly at a time of active legislation. It is an admonition that was sounded long ago before the controversial days by a great

⁵ *Muller v. Oregon*, 208 U. S. 412.

⁶ See Briefs in *Stettler v. O'Hara* (minimum wage case) now pending before the Supreme Court of the United States on appeal from Oregon (139 Pac. 734). An examination of the briefs in the much criticised case of *Coppage v. Kansas*, 236 U. S. 1, makes one wonder whether a different result might not have been reached if the Court had had before it the mass of material available, at this stage of things, to demonstrate that prohibiting economic coercion against trade unions is a measure for industrial peace, a means of securing "the equality of position between the parties in which liberty of contract begins."

⁷ "The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts, plainly, transcending the power conferred by the Constitution upon the legislative body." *People v. Williams*, 189 N. Y. 131, 135.

⁸ *People v. Crane*, 108 N. E. 427, 28 HARV. L. REV. 498, 628.

⁹ *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 270; see also *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 340; *Pacific Telephone Co. v. Oregon*, 223 U. S. 118, 150.

teacher of constitutional law, with the vision of a statesman, James Bradley Thayer, to the end that responsibility for mischievous or inadequate legislation may be sharply brought home where it belongs, — to the legislature and to the people themselves.¹⁰

Felix Frankfurter.

DUE PROCESS OF LAW IN THE FRANK CASE. — Leo Frank, after three unsuccessful attempts to have a conviction of murder set aside by the Supreme Court of Georgia¹ and a fruitless application to the Supreme Court of the United States for a writ of error,² petitioned a United States District Court for a writ of *habeas corpus*. The denial of this petition without a hearing on the facts was recently upheld by a majority decision of the Supreme Court.³ *Frank v. Mangum*, 35 Sup. Ct. 582. While the dramatic interest of this *cause célèbre* has been uppermost in the popular mind, the intricate legal issues of the latest appeal make it noteworthy for the profession. The appellant sought to raise the constitutional question necessary for federal *habeas corpus*⁴ by contending that he had been deprived of due process of law, first by the reception of the verdict in his absence, and secondly by mob domination of the jury.

The court was unanimous that the first position could not be maintained. Due process of law does not forbid a state statute depriving criminals of indictment and trial by grand and *petit* juries, and the right to appeal.⁵ As presence of the accused at all stages of the trial is not an essential of due process,⁶ it is submitted that a statute compelling the accused to waive his absence at the reception of the verdict unless timely advantage were taken of it should be upheld as a reasonable measure to prevent dilatory tactics without impairing substantial justice. In the principal case there was no such statute, but the state court held that under the local practice appellant's failure to rely upon this known ground on the first motion for a new trial amounted to such a waiver.⁷ If such a rule had in fact been previously established by the courts, a decision in conformity therewith would be no more objectionable than a statute. The appellant contended, however, that the court's decision was an erroneous departure from the established state law⁸ and hence a deprivation of due process. But even if the state court's decision, which seems well supported, overruled previous authorities, the Fourteenth Amendment would not give the federal courts jurisdiction to disregard

¹⁰ See THAYER, *LEGAL ESSAYS*, pp. 39, 41.

¹ *Frank v. State*, 141 Ga. 243, 80 S. E. 1016, 27 HARV. L. REV. 762; *Frank v. State*, 83 S. E. 233 (Ga.); *Frank v. State*, 83 S. E. 645 (Ga.).

² In the Matter of Frank, Petitioner, 235 U. S. 694 (without opinion).

³ Holmes, J., and Hughes, J., dissenting. For a more detailed statement of the case, see *RECENT CASES*, p. 810.

⁴ U. S. R. S. 753.

⁵ *Hurtado v. California*, 110 U. S. 516; *Maxwell v. Dow*, 176 U. S. 581; *Andrews v. Swartz*, 156 U. S. 272.

⁶ *Howard v. Kentucky*, 200 U. S. 164.

⁷ *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897; *Leathers v. Leathers*, 138 Ga. 740, 76 S. E. 44.

⁸ Citing *Nolan v. State*, 53 Ga. 137; S. C. 55 Ga. 521.

this erroneous ruling unless a statute embodying the new rule laid down would be itself unconstitutional.⁹ The appellant's further contention that an alteration in the course of decisions would be an *ex post facto* law is clearly untenable, for this clause applies only to legislation.¹⁰

But the second point gave the court more trouble. The majority apparently conceded that conviction by a jury dominated by a mob, even in a court of competent jurisdiction by the law of its creation, would not be due process. If such a conviction is upheld by a state court of appeal it is more than an erroneous departure from the requirements of the state law. A statute to legalize lynch law would be unhesitatingly struck down. A single *decision* upholding it is equally obnoxious to the Fourteenth Amendment, which is not, like the *ex post facto* clause, restricted in its application to legislation alone.¹¹ Although this might at first seem clearer in the case of habitual departure from a valid statute,¹² the Amendment was designed to protect the individual,¹³ and the invidious discrimination of the state agency against a single victim falls within the additional prohibition against denying to any person the equal protection of the laws. This view may lead to a potential federal question in every state case. But many determinants of the line which divides mere errors from constitutional infringements are furnished by the cases settling what statutory modifications of procedure are invalid. And the practical difficulty cannot prevent intervention by the federal courts where due process is denied.

Manifestly, where such a question is raised, the Supreme Court must have the right on writ of error to go behind the state court's finding of facts and independently examine the record. Otherwise a state court could deprive the Supreme Court of jurisdiction by an erroneous finding that alleged facts did not sufficiently establish mob domination of a jury.¹⁴ At a hearing to determine whether *habeas corpus* shall issue, the federal court in addition is authorized by statute to investigate all facts, even extraneous to the record, bearing upon the petitioner's alleged unconstitutional detention.¹⁵ As this was conceded by the majority in the principal case, the discussion narrowed down to the question whether the petition showed upon its face that the appellant was not entitled to a hearing. The federal courts are properly cautious in exercising the delicate jurisdiction by which a state is deprived of its custody over a convicted criminal. No hearing will be granted where the state courts

⁹ *Central Land Co. v. Laidley*, 159 U. S. 103; *In re Converse*, 137 U. S. 624; *Storti v. Massachusetts*, 183 U. S. 138; but see for an able argument *contra*, "The Supreme Court of the United States and the Enforcement of State Law by State Courts," by Professor Henry Schofield, 3 ILL. L. REV. 195; cf. WILLOUGHBY, *THE CONSTITUTION*, § 472.

¹⁰ *Ross v. Oregon*, 227 U. S. 150.

¹¹ *Ex parte Virginia*, 100 U. S. 339; *Scott v. McNeal*, 154 U. S. 34. See Judge Swayze in 26 HARV. L. REV. 1, 2.

¹² *Yick Wo v. Hopkins*, 118 U. S. 356; see WILLOUGHBY, *THE CONSTITUTION*, § 759.

¹³ The single victim of a court decision which violated the Fourteenth Amendment was protected in *Chicago, B. & Q. R. v. Chicago*, 166 U. S. 226; *Scott v. McNeal*, *supra*.

¹⁴ Cf. the right of the Supreme Court to go behind the state court's findings in cases under the contract clause, to ascertain whether a valid contract existed. *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *McCullough v. Virginia*, 172 U. S. 102.

¹⁵ R. S. 754-761.

have not finally disposed of the case,¹⁶ and even then the petitioner may be left to his writ of error to the United States Supreme Court.¹⁷ In the principal case, the petitioner relied upon a bald reassertion of the same facts which, as the petition showed, had been twice found untrue by the Supreme Court of Georgia. While, as has been seen, this conclusion is by no means binding, the majority may well be justified in refusing a hearing without the allegation of some additional facts or reasons why the state court's findings should be treated with such scant respect. The court may reasonably assume that the petitioner's case has been put in its strongest aspect on the petition. Any other rule of pleading would make the writ of *habeas corpus* peculiarly efficient as a weapon to prolong trials and postpone punishments.¹⁸

THE MAXIM: NO PRESUMPTION UPON A PRESUMPTION. — Authorities on the law of evidence generally agree with the remark of a recent text-writer that the term "presumption" is, in the law, "entirely superfluous" and "principally used, at the present time, on account of its convenient obscurity."¹ This censure applies both to what are called "presumptions of law" and what are called "presumptions of fact."² The former is simply a cloak to cover various rules of substantive law.³ For instance, the courts really created a rule of property that adverse possession for twenty years bars the disseisee when they said that a lost grant would be "presumed" as a matter of law after that period. The latter is an imposing term usually signifying that the jury has been logical and reasonable in drawing certain inferences from proven facts.⁴ If there be obscurity due to failure to analyze and see in just what sense the word is used when used singly, it is doubly delusive when encountered in the common maxim, "there shall be no presumption upon a presumption." This doctrine, though capable of other interpretations, is limited in the books to the meaning that an inference, sometimes called a "presumption of fact," may not be based upon another inference, but must

¹⁶ *Baker v. Grice*, 169 U. S. 284; *In re Wood*, 140 U. S. 278. Cf. Gray, J., in *Whitten v. Tomlinson*, 160 U. S. 231, 240, "To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states and with the performance by this court of its proper duties."

¹⁷ See *Cook v. Hart*, 146 U. S. 183, 194; WILLOUGHBY, THE CONSTITUTION, § 71.

¹⁸ See CHURCH, HABEAS CORPUS, 149, n. 3; cf. GUTHRIE, FOURTEENTH AMENDMENT, 177 ff.

¹ See 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE, § 1026; 4 WIGMORE, EVIDENCE, § 2491; J. B. Thayer, "Presumptions and the Law of Evidence," 3 HARV. L. REV. 141, 166.

² J. B. Thayer, *supra*, at p. 166. "In dealing with the subject of evidence it is expedient to avoid the use of these terms, presumptions of law and presumptions of fact, for they do not help the discussion, and they are worse than useless, from their ambiguity."

³ See J. B. Thayer, *supra*, at p. 148; BEST, EVIDENCE, 11 ed., § 304. "Presumptions of law are in reality rules of law and a part of the law itself." *Doane v. Glenn*, 1 Colo. 495, 504.

⁴ See BEST, EVIDENCE, § 304; CHAMBERLAYNE, EVIDENCE, § 1027. "A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is in probability." *Liverpool, etc. Ins. Co. v. Southern Pacific Co.*, 125 Cal. 434, 58 Pac. 55.

be drawn from some fact "established in direct evidence, as if it were the very fact in issue."⁵ The rule in this form has been vigorously attacked by Dean Wigmore;⁶ but it nevertheless crops up with frequent recurrence, sometimes with unfortunate results.⁷ Usually the decisions appear correct in result; some may be explained on the general ground that there was not sufficient evidence to support a verdict;⁸ in others the primary facts upon which the structure of the jury's reasoning was built were not clearly established;⁹ in still others, the inferences asked were unreasonable;¹⁰ but in all the maxim did nothing but give a confused and unsatisfactory explanation of a correct result.

A recent case in which the maxim was invoked shows its usual application. *Atchison, T. & S. F. Ry. Co. v. De Sedillo*, 219 Fed. 686. In this case, it was necessary, in order to charge the railroad with the violation of a duty of due care, to prove that the deceased was struck at a certain crossing. His body was found on the track five hundred feet below the crossing. A foot severed from the body was found caught in a frog at an intermediate point. Footprints were found at the crossing, and two marks, such as might have been made by a body dragged along by a train, extended from the crossing to the point near where the body was found. The jury was asked to infer that the footprints were those of deceased, and from this and the marks along the track to infer that he was struck at the crossing and dragged along to the point where his body was found. A verdict for the plaintiff was set aside because founded on "a presumption upon a presumption." If the result was correct, it was simply on the ground that the plaintiff's case was too weak and conjectural to go to the jury. But had there been evidence from which the jury might reasonably have inferred that the footprints at the crossing were those of the deceased, it would seem on principle that, coupling that inference with the other facts of the case, the jury might again reasonably have inferred that the deceased was struck at the crossing, and so on *ad infinitum*.

In general, it is only where the court feels that the evidence presented is insufficient to support a verdict that it bothers to forbid inference upon inference. Manifestly, in any case of circumstantial evidence, the ultimate conclusion from the facts is arrived at through a series of inferences.¹¹ Thus, a jury may infer from handwriting peculiarities that defendant wrote a threatening letter, and from this fact infer that it was he who murdered deceased. This logical process occurs every day, under the very noses of courts which proclaim that there may be no presumption upon a presumption. The true rule is that if the primary

⁵ STARKIE, EVIDENCE, pt. 1, p. 80, quoted in *United States v. Ross*, 92 U. S. 281, 284; 2 CHAMBERLAYNE, EVIDENCE, § 1029; 2 WHARTON, EVIDENCE, 2 ed., § 1226.

⁶ 1 WIGMORE, EVIDENCE, § 41.

⁷ *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563.

⁸ *Douglass v. Mitchell*, 35 Pa. St. 440; *Shoeman v. Temple Safety Deposit Vaults*, 189 Ill. App. 316.

⁹ *Bycynski v. Illinois Steel Co.*, 115 Ill. App. 326.

¹⁰ *Lamb v. Union Ry. Co.*, 195 N. Y. 260, 88 N. E. 371; *Phila. City Pass. Ry. Co. v. Henrice*, 92 Pa. St. 431; *Manning v. John Hancock Mut. L. Ins. Co.*, 100 U. S. 693; *Thayer v. Smoky Hollow Coal Co.*, 121 Ia. 121, 96 N. W. 718; *United States v. Ross*, 92 U. S. 281.

¹¹ See 1 WIGMORE, EVIDENCE, § 41.

fact is sufficiently established to be the basis for a reasonable inference, such inference may be drawn and used in connection with other facts, or even alone, as the foundation for a fresh inference.¹² If each inference is reasonable, the verdict, which is the final inference, cannot fail to be reasonable, and hence unimpeachable. This sounder rule is sometimes stated as an exception to the maxim that there shall be no presumption on a presumption;¹³ but it is apparent that the exception, rightly understood, eats up the rule. Like numerous other impressive legal phrases, which serve but to obscure,¹⁴ the maxim may profitably be discarded.

CONTROL RETAINED BY THE INCORPORATING STATE OVER THE OBLIGATIONS OF A FOREIGN CORPORATION. — Two conflicting decisions, handed down within a few months of each other on precisely the same state of facts, illustrate the perplexing uncertainty which prevails concerning the extent of legislative control over the obligations of a foreign corporation retained by the sovereign of its domicile. In each case the plaintiff joined, in New York, a Canadian mutual benefit insurance association. By the authority of an act of the Canadian Parliament, subsequently adopted, an otherwise unauthorized assessment was levied on the members of the association, and declared a lien on their policies. In a suit to enjoin the enforcement of the lien, the Supreme Court of New York held it invalid. *M'Clement v. Supreme Court, I. O. F.*, 88 Misc. 475. On the same facts, in an action on the policy, a federal court, sitting in New York, reached the opposite conclusion. *Stockwell v. Supreme Court, I. O. F.*, 216 Fed. 205 (Dist. Ct., W. D., N. Y.).

The question of what law governs the obligation and the discharge of contracts is one as to which there is still no consensus of legal opinion.¹ A discussion of this problem in relation to the principal cases, however, would be futile, for in each case, the place of making was identical with the place of performance. Furthermore, the principle invoked by the federal court operates entirely without regard to the law that would normally govern a contract. Following the case of *Canada Southern Ry. Co. v. Gebhard*,² this court affirms broadly that as to contracts with a foreign corporation, the local law is subject in all respects to the legislative control that may be constitutionally exercised over the corporation at its domicile. To some extent, this notion is a familiar one. Thus it is elementary that the creating sovereign can put an end to the existence

¹² See BEST, PRESUMPTIONS OF LAW AND FACT, p. 247, "The existence of the principal or any intermediary evidentiary fact may be inferred from another, which is only the probable consequence of a third."

¹³ *Hinshaw v. State*, 147 Ind. 334, 363, 47 N. E. 157, 166. "This process of tallying and confirming each circumstance by the others does not infringe the general rule that one inference cannot be based on another. There is an important exception to that rule, however. A fact in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference has the required basis of a proved fact."

¹⁴ See Judge Smith, "The Use of Maxims in Jurisprudence," 9 HARV. L. REV. 13.

¹ For a statement of the conflicting views, see a series of articles by Prof. J. H. Beale in 23 HARV. L. REV. 1, 79, 194, 260; see also, BEALE, SUMMARY OF THE CONFLICT OF LAWS, § 97.

² 109 U. S. 527.

of the corporation everywhere.³ Moreover, if the right has been reserved, it may appoint a successor to all the rights of action belonging to the corporation.⁴ The shareholder's liability for the debts of the corporation is likewise governed by the law of the incorporating state.⁵ Limitations imposed in the charter hamper the corporation wherever it is allowed to do business.⁶ And, finally, it was established by the Gebhard case that all persons dealing with a foreign corporation are bound by subsequent legislation altering the powers and obligations of the corporation, which is valid by the law of the corporation's domicile, even though such legislation would be unconstitutional if tested by the law governing the contract.⁷ It is essential, however, that such statutory changes be constitutional by the law of the state of charter, and this requirement, in view of the provisions of our federal and state constitutions, practically limits the doctrine to corporations created outside of the United States.⁸

To determine the application of these authorities to the principal cases, it is essential to inquire into the precise nature of the assessment. It is clear in the first place that it created no personal obligation which the association could have enforced against the insured,⁹ and it is therefore unnecessary to seek consent by the member to the legislative jurisdiction of Canada. But the assessment did purport to establish a lien on the policy in favor of the association, and to discharge its obligation to that extent. In so far as the holder of a mutual benefit insurance policy corresponds to a stockholder in a corporation,¹⁰ his position with respect to assessments of this kind appears to depend on the law of the state of

³ *Remington v. Samana Bay Co.*, 140 Mass. 494, 5 N. E. 292; *Marion Phosphate Co. v. Perry*, 74 Fed. 425; *Princess of Reuss v. Bos*, L. R. 5 H. L. 176. See also *Rust v. United Waterworks Co.*, 70 Fed. 129, where it was held that officers of the corporation enjoined from acting for the corporation by the courts of its domicile could not act abroad.

⁴ *Relfe v. Rundle*, 103 U. S. 222.

⁵ *Bernheimer v. Converse*, 206 U. S. 516; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888; see 23 HARV. L. REV. 37.

⁶ Thus it is well settled that the *ultra vires* nature of an act is to be determined by the law of the domicile; *Banque Franco-Egyptienne v. Brown*, 34 Fed. 162; *Southern Mut. Aid Ass'n v. Cobb*, 60 Fla. 198, 53 So. 505; *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 172, 21 Atl. 680; *Warner v. Delbridge & C. Co.*, 110 Mich. 590, 68 N. W. 283. But of course a statute of the state of charter may be construed to be inapplicable to acts done outside the state. *Metropolitan L. Ins. Co. v. Bradley*, 98 Tex. 230, 82 S. W. 1031; *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 36 So. 790. Cf. *Supreme Council of Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, where a statute of the incorporating sovereign was construed to apply outside the state in order to secure uniform treatment of all members of the association.

⁷ This rule must rest on the ground that the obligations of foreign corporations are inherently subject to the law of the state of their creation. It seems impossible to argue that the parties, when making the contract, agreed on that law as the one to discharge it.

⁸ It has been held that subsequent statutes passed at the domicile, which would be invalid there as impairing the obligation of contracts, will not be recognized elsewhere as binding those who have contracted with the corporation. *Provident Sav. Life Assur. Soc. v. Bailey*, 118 Ky. 36, 80 S. W. 452; *Green v. Supreme Council of Royal Arcanum*, 206 N. Y. 591, 100 N. E. 411.

⁹ *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222; *Gibson v. McGrew*, 154 Ind. 273, 56 N. E. 674.

¹⁰ Thus it is often loosely said that the holder of a mutual insurance policy is both insurer and insured, and stands in the position of a stockholder in the corporation. See NIBLACK, *BENEFIT SOCIETIES*, pp. 9, 471; 2 MAY, *INSURANCE*, 4 ed., §§ 548, 549.

charter in the same way that the stockholder's liability for assessments,¹¹ or to have liens declared on his stock¹² is determined by valid regulations of the incorporating sovereign. Entirely apart from this, however, the assessment may be considered as equivalent to a partial discharge of the policy. The situation is then exactly covered by the authorities. For anything done at the legal home of the corporation under the authority of its constitutionally enacted laws "which discharges it from liability there, discharges it from liability everywhere."¹³ Even if resort to a new corporate power to insert this added condition precedent to liability be thought necessary, the situation is controlled by the broad language of the Gebhard case, although that decision on its facts may be limited to the discharge of obligations.

The only avenue of escape from this conclusion is the one taken by the New York case. It is, of course, well settled that local policy may lead a state to refuse to recognize a corporate power granted by a foreign sovereign.¹⁴ By the same token, in view of the rigorously asserted policy of our law which finds expression in the Contract Clause, it is said that foreign corporations should be given no greater opportunity to avoid their obligations by the aid of a friendly legislature than is accorded to corporations created within the state.¹⁵ But on the whole, it seems unwise to give effect to such an uncertain principle for the sake of protecting those who know that they are dealing with corporations created by sovereigns outside of the United States, and should realize that they are at the mercy of the sovereigns with whose creatures they deal.

THE FOURTEENTH AMENDMENT AND THROUGH CONNECTING CARRIAGE.

— At common law through connecting carriage of carload shipments was beyond the scope of a rail carrier's public duty, and so was entirely dependent on unregulated private arrangement between connecting carriers.¹ Perhaps a single exception existed in a duty to accept and forward carload shipments, without reloading, when tendered at a point of

¹¹ See *supra*, n. 5. No case has been found in which subsequent statutory liability was sought to be imposed on shareholders by a sovereign other than one of the United States, but it seems that in the absence of any constitutional prohibition at the domicile against impairing the obligation of contracts, such a statute would be effective.

¹² See *Hudson River Pulp & Paper Co. v. Warner & Co.*, 99 Fed. 187. See also *Warner v. Delbridge & C. Co.*, 110 Mich. 590, 594, 68 N. W. 283, 285.

¹³ See *Canada Southern Ry. v. Gebhard*, *supra*, p. 538.

¹⁴ *Briscoe v. Southern Kansas Ry. Co.*, 40 Fed. 273.

¹⁵ See dissenting opinion by Harlan, J., in *Canada Southern Ry. Co. v. Gebhard*, *supra*, p. 540.

¹ A carrier was bound to accept goods tendered by another carrier in the same manner as goods tendered by a private person. See 22 HARV. L. REV. 566-570. But it was under no obligation to make any different arrangements for the reception of connecting traffic. Thus it need not establish through routes or rates. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667. *A fortiori*, it would seem, it was not bound to permit or establish physical connections. *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co.*, 37 Fed. 567, 621. So it could establish through routing with one carrier and refuse another under similar circumstances, without unlawful discrimination. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, *supra*. See also *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. 400; *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co.*, 61 Fed. 158.

physical connection.² Even this convenience was dependent on the caprice of the initial carrier, which owed no duty to allow its cars to move off its own lines.³ The amelioration of this intolerable situation was one of the chief purposes of the large body of state and national legislation for the regulation of carriers, either directly or through administrative boards.⁴ These regulations, aside from practical difficulties of formulation and enforcement, bid fair to be successful, but they have had, from time to time, as their chief obstacle the asserting of the due process clause of the Constitution.

But in spite of this it is well settled that valid regulation may be made, when warranted by the demands of commerce, to compel the construction of physical connections,⁵ the reception of exchange traffic cars for main line transportation,⁶ and reasonable alteration of running schedules in the interest of convenient connecting service.⁷ However, a decidedly conservative view was taken in the case of *Louisville & Nashville R. Co. v. Central Stock Yards Co.*⁸ It was there held that to compel one rail carrier to surrender loaded cars to another to facilitate the delivery of shipments consigned to points on the line of the latter, without making express provision for compensating the owner for the use of the cars and for safeguarding him against their loss or delayed return was obnoxious to the due process clause. Although the decision, when so limited, placed merely a formal obstacle in the way of such regulation, the attitude taken in the case resulted in at least one questionable state decision.⁹ It is therefore pleasing to note a recent decision of the Supreme Court reaching an opposite result on very similar facts. *Michigan Central Ry. Co. v. Michigan Railroad Commission*, 236 U. S. 615.¹⁰

A more serious stumbling-block was thrown in the way of efficient regulation of through connecting service by this same *Central Stock Yards* case in another opinion, perhaps unnecessary to the decision. It was intimated that a terminal operated as an adjunct to main line transportation was in some way constitutionally immune from any regulation requiring through connecting service in the nature of terminal switching;¹¹ or as elsewhere expressed, that a terminal is a part of the quasi-private

² See *Michigan Central R. Co. v. Smithson*, 45 Mich. 212, 221; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 453, 71 N. W. 42, 47. But see *Oregon, etc. Ry. Co. v. Northern Pacific R. Co.*, 51 Fed. 465, 472.

³ *Pittsburg, C. C. & St. L. Ry. Co. v. Morton*, 61 Ind. 539.

⁴ See the remarks with reference to the Interstate Commerce Commission in *Missouri & Illinois Coal Co. v. Illinois Central R. Co.*, 22 I. C. C. 39, 46.

⁵ *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287.

⁶ *Chicago, M. & St. P. Ry. Co. v. Iowa*, 233 U. S. 334.

⁷ *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1.

⁸ 212 U. S. 132. See 22 HARV. L. REV. 449.

⁹ *Gulf, C. & S. F. Ry. Co. v. State*, 56 Tex. Civ. App. 353, 120 S. W. 1028.

¹⁰ For a statement of the case, see this issue of the REVIEW, p. 810. The case was distinguished on the ground that the Michigan court had held that the statute, under which the order was made, impliedly provided for compensation. *Michigan Central R. Co. v. Michigan Railroad Commission*, 168 Mich. 230, 132 N. W. 1068. But the same circumstance existed in the former case. See dissenting opinion of Mr. Justice McKenna, 212 U. S. 132, 148; and *Louisville & Nashville Ry. Co. v. Central Stock Yards Co.*, 30 Ky. L. Rep. 18, 35, 97 S. W. 778, 790.

¹¹ 212 U. S. 132, 145.

property of a carrier, which other roads are bound to respect.¹² This rule in its extreme form was in substance repudiated in a case in which, owing to the large area of the terminal system, the court chose to regard switching as undistinguishable from main line transportation.¹³ In a very recent decision the case was again distinguished. *Pennsylvania Co. v. United States*, 236 U. S. 351. On the ground that the terminal switching required had to do only with non-competitive traffic, and that like service was being rendered for other roads similarly situated, the order compelling it was upheld.¹⁴ The latter feature seems unimportant, since it is very doubtful whether there is any duty of equal treatment as to those whom a carrier is not bound to serve,¹⁵ unless it is a basis for finding a public profession of terminal carriage for others.¹⁶ Moreover, public profession by a carrier of a related service is not essential to the validity of regulation requiring its performance. This is shown by the usual case of enforced through carriage, as to which there was no common-law duty.¹⁷ Indeed, it seems that a private carrier may be compelled to undertake public carriage if public interest is sufficient.¹⁸ It is submitted that the distinction taken as to absence of competition is likewise without basis. It seems plainly demonstrated that a carrier is bound in certain cases to perform connecting service over its terminal, and the fact that the required service assists a competitor as to the subject matter of competition should not conclusively determine the unreasonableness of the requirement.¹⁹ A public carrier has no right to object to regulation on the ground that it diminishes profits unless it prevents realization of a reasonable income.²⁰ It appears that the objection to switching competitive traffic amounts to no more than that it causes financial loss, and should be tested by the same standard. Consequently the fact might be taken into consideration in determining the reasonableness of the service and the compensation necessary, but should not be of itself conclusive as to constitutional invalidity.

Although some shreds of the *Central Stock Yards* case may remain

¹² See *Pennsylvania Co. v. United States*, 214 Fed. 445, 453 (dissenting opinion).

¹³ *Grand Trunk Ry. v. Michigan Railroad Commission*, 231 U. S. 457.

¹⁴ A statement of the case will be found in *RECENT CASES*, p. 809. The case is also important for its holding that such service does not amount to compelling one carrier to submit to the "use" of its terminals by another within the proviso of § 3 of the Commerce Act.

¹⁵ See *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co. and Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co.*, cited *supra*, n. 1.

¹⁶ A carrier engaged exclusively in terminal carriage must serve all railroads on equal terms. *St. Louis, S. & P. R. Co. v. Pekin U. R. Co.*, 26 I. C. C. 226.

¹⁷ See n. 1, *supra*.

¹⁸ It is submitted that this is the necessary result of the *Pipe Line Cases*, 234 U. S. 548. See 28 HARV. L. REV. 84.

¹⁹ Compulsory terminal switching of competitive traffic was upheld in *Chicago, I. & L. Ry. v. Railroad Commission of Indiana*, 175 Ind. 630, 95 N. E. 364. See also *Nashville v. Louisville & Nashville R. Co.*, I. C. C., No. 6484 (Feb. 27, 1915). *Contra*, *Mississippi Railroad Commission v. Yazoo & M. V. R. Co.*, 100 Miss. 595, 56 So. 668. The opinion in the *Jacobson case* (*supra*, n. 5) indicated that the fact that the desired connection would open up competing markets and sources of supply which would deprive the railroad opposing the connection of a longer haul to less desirable markets and sources of supply would not make the requirement of connecting service unconstitutional.

²⁰ See 28 HARV. L. REV. 683.

even after the thrusts on each side by these two recent cases, the tendency of the court would appear to be to complete its destruction at the first opportunity.

THE EFFECT OF A RELEASE BY THE DECEASED ON THE STATUTORY ACTION FOR DEATH BY WRONGFUL ACT. — It is a much mooted question whether the beneficiaries may recover, under statutes similar to Lord Campbell's Act,¹ if there is a defense which would have prevented the deceased from recovering had he lived. The primary inquiry in every such case is whether the statute gives the beneficiary a new and independent right of action, recognizing a property interest of the relatives in the life of the deceased, or merely abrogates the common-law rule that tort actions die with the injured party. At common law there were two severe rules calling for statutory relief, — personal actions died with the party injured, and the relatives of a deceased person had no action for his wrongful death. It would seem tolerably clear that the legislature was addressing itself to the second of these common-law defects when it provided an action for the benefit of the next of kin, whereby damages for their "pecuniary injury resulting from such death" might be recovered. Yet the courts have been considerably troubled by the nature of the right created. There are conflicting expressions in the English cases.² The American courts are divided; a few construe their statutes as merely preserving deceased's right of action.³ By the weight of authority, however, a new cause of action accrues to the beneficiaries at the death of the deceased, in which they may recover the loss they have suffered from his death.⁴

Of course, under the minority view, any defenses good against the deceased would be good against those who succeed to his cause of action.⁵ But even those courts which give the beneficiaries a new cause of action frequently reach the same result, basing their decisions on the common statutory provisions that "the wrongful act must have been such as

¹ 9 & 10 VICT., c. 93. For a comparative table of American statutes, see TIFFANY, *DEATH BY WRONGFUL ACT*, 2 ed., p. xix and Appendix.

² See *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555; *Griffiths v. Dudley*, L. R. 9 Q. B. 357. Cf. *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Seward v. The Vera Cruz*, 10 A. C. 59.

³ *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194; *Williams v. Alabama Great Southern R. R. Co.*, 158 Ala. 396, 48 So. 485; *St. Louis, I. M. & S. R. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102.

⁴ *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664; *Spradlin v. Georgia Ry. & Electric Co.*, 139 Ga. 575, 77 S. E. 799; *Adams v. Northern Pac. Ry. Co.*, 95 Fed. 938; *Mahoney Valley Ry. v. Van Alstine*, 77 Oh. St. 395, 83 N. E. 667. See also cases cited in n. 13, *infra*; TIFFANY, *DEATH BY WRONGFUL ACT*, § 23. Most states now have survival statutes, providing that tort actions shall survive the death of the plaintiff and defendant or both, in addition to a statute like Lord Campbell's Act. See 15 HARV. L. REV. 854. The survival statute is usually held to give no right of action if the death was instantaneous. *Moran v. Hollings*, 125 Mass. 93. Maine and Michigan accordingly hold that the death statute applies only to cases of instantaneous death. *Dolson v. Lake Shore & M. S. R. R. Co.*, 128 Mich. 444, 87 N. W. 629. See TIFFANY, *DEATH BY WRONGFUL ACT*, §§ 43, 44-1. The limitation is, however, not generally accepted. *Commonwealth v. Metropolitan R. R. Co.*, 107 Mass. 236. See TIFFANY, *DEATH BY WRONGFUL ACT*, §§ 73, 74.

⁵ *Read v. Great Eastern Railway Co.*, L. R. 3 Q. B. 555; *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194.

would have enabled the deceased to maintain an action if death had not ensued,"⁶ or that the beneficiaries may recover "if the deceased might have recovered had he lived."⁷ From these qualifications the courts argue that the accrual of the new right of action is made dependent on the existence of the original right at the death of the injured party.⁸ This interpretation may possibly be warranted under a statute like that in Kansas, containing the last of the above-mentioned provisions, but it is submitted that where, as in the majority of states, the statute requires only such a wrongful act as would have entitled the deceased to an action, the beneficiaries' right is dependent only on the acquiring of a cause of action by the deceased, not on its continued existence at his death.

If this interpretation is correct, it is important to make a distinction between two classes of defenses which may arise. Certain defenses, such as contributory negligence of the deceased or a contract exempting the injuring party from liability, prevent any right of action ever arising; there has been no "wrongful act" which would have entitled the deceased to recover if he had lived. Consequently, the beneficiaries could get no rights under any statute containing that requirement. The courts have uniformly held that the contributory negligence of the deceased will bar the beneficiaries;⁹ the same result has usually been reached when the deceased, previous to the accident, made a contract with the defendant, exempting him from liability, except of course in cases where such contracts are void as against public policy.¹⁰ On the other hand, such defenses as a release by the beneficiary, or a payment to him, merely put an end to a right of action that has once arisen. There has been a "wrongful act," and where that is all the statute requires, a subsequent release by the deceased should not cut off the beneficiaries' right of action.¹¹ This result was reached in a recent South Dakota case, in a careful and exhaustive opinion. *Rowe v. Richard*, 151 N. W. 1001. There are, however, only a few cases in accord with this decision,¹² the weight of authority holding that such a release will

⁶ See SOUTH DAKOTA COMP. LAWS, 1913, p. 444c, c. 301, § 1.

⁷ See KAN. GEN. STAT., 1909, §§ 6014, 6015.

⁸ *Sewell v. Atchison, T. & S. F. Ry. Co.*, 78 Kan. 1, 96 Pac. 1007; *State v. United Rys. & Electric Co. of Baltimore*, 121 Md. 457, 88 Atl. 229.

The Maryland statute (ANN. CODE PUB. CIV. LAWS 1911, Art. 67, §§ 1-4) is like that in South Dakota.

⁹ *Weatherly v. Nashville, C. & St. L. Ry. Co.*, 166 Ala. 575, 51 So. 959; *Perkins v. Oxford Paper Co.*, 104 Me. 109, 71 Atl. 476.

¹⁰ *Northern Pac. Ry. Co. v. Adams*, 192 U. S. 440 (reversing 95 Fed. 938); *Sewell v. Atchison, T. & S. F. Ry. Co.*, 78 Kan. 1, 96 Pac. 1007; *Perry v. Philadelphia, B. & W. R. R. Co.*, 77 Atl. 725 (Del. Super.). See 13 HARV. L. REV. 309. The *Sewell* case (*supra*) properly distinguishes contracts exempting from liability from those limiting liability. If the contract is of the latter kind, the deceased acquires a right of action, and an action accrues to the beneficiaries. *Railway Co. v. Martin*, 59 Kan. 437, 53 Pac. 461; see *Illinois Cent. R. R. Co. v. Cozby*, 174 Ill. 169, 50 N. E. 1011.

¹¹ See ELLIOTT, RAILROADS, § 1376. It is proper that the wrongdoer be forced to make two satisfactions where his single act has invaded the distinct rights of two people, — the injured party's right to personal immunity, and his relatives' pecuniary interest in his life.

¹² *Donahue v. Drexler*, 82 Ky. 157; *Strode v. St. Louis Transit Co.*, 87 S. W. 976 (Mo.); *Maguire v. Cinn. Traction Co.*, 33 Ohio Cir. Ct. 24.

There are also several cases holding that a recovery by the executor for the benefit

bar the beneficiaries.¹³ If the statute gives a new, independent cause of action, it is certainly anomalous to permit the deceased to release or discharge a claim which does not belong to him and which does not accrue until his death. In breaking away from the confining interpretation generally put upon these remedial enactments, the principal case seems to reach a logical and satisfactory result.

LIMITATIONS UPON A STATE'S JURISDICTION OVER FOREIGN CORPORATIONS. — A recent decision of the Supreme Court of the United States¹ raises again the problem as to the nature of the jurisdiction which a state has over a foreign corporation. *Simon v. Southern Ry. Co.*, 236 U. S. 115. A judgment against such a corporation had been obtained on a cause of action arising outside the state under a state statute providing for service of process on the secretary of state when there had been a failure to designate a proper agent to receive it. This method of obtaining jurisdiction was held to be in violation of the constitutional guaranty of due process of law.

It is the theory of the common law that a corporation cannot exist beyond the confines of the jurisdiction which created it. A state can therefore never obtain personal jurisdiction over a foreign corporation by means of its actual presence in the state, and must gain control if at all by some other method. Since a state has the power in general to prevent such a corporation from engaging in business within its borders,² *a fortiori*, it may impose conditions upon it which it must accept before it can act legally within the state.³ There are no limitations, other than possible constitutional ones, which will be discussed later, upon the restrictions which may thus be made.⁴ So the states have usually provided by statute that a corporation must consent to be sued in the courts of the state as a condition precedent to entrance, and consent is of course as good as actual presence as a foundation for jurisdiction *in personam*.⁵ If the corporation sends no regular agents to do business,

of the deceased's estate will not bar a recovery by the next of kin. This is a necessary recognition that an entirely new right is created. *Spradlin v. Georgia Ry. & Electric Co.*, 139 Ga. 575, 77 S. E. 799; *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664; *Mahoney Valley Ry. v. Van Alstine*, 77 Oh. St. 395, 83 N. E. 607.

¹³ *Southern Bell Telephone & Telegraph Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881; *Michigan v. Boyne City, G. & A. R. R. Co.*, 141 N. W. 905 (Mich.); *State v. United Railway & Electric Co. of Baltimore*, 121 Md. 452, 88 Atl. 229. See 14 HARV. L. REV. 296. TIFFANY, DEATH BY WRONGFUL ACT, § 124. The Georgia court reaches this result, although holding that a recovery by the estate under the survival statute will not bar the action by next of kin. Cf. *Spradlin v. Georgia Ry. & Electric Co.*, 139 Ga. 575, 77 S. E. 799. This result is all the more extraordinary, because the Georgia statute does not require that the deceased could have recovered if death had not ensued. GA. CODE, 1910, § 4424.

¹ A statement of the facts of this case will be found on p. 815 of this number of the REVIEW.

² *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

³ *Paul v. Virginia*, 8 Wall. (U. S.) 168.

⁴ BEALE, FOREIGN CORPORATIONS, § 121.

⁵ *Copin v. Adamson*, L. R. 9 Ex. 345. See for a typical recent case, *W. J. Armstrong Co. v. New York Central, etc. Co.*, 151 N. W. 917 (Wis.).

there is no foundation for this consent.⁶ But when agents are sent, it consents as a matter of fact to the conditions imposed by the state law and will be bound by them.⁷ When according to statute an agent to receive process is named, or, although not named, is regularly present, engaged in the corporation's business, service on such a person is sufficient.⁸ The courts have held in such cases that suit may be brought on any transitory cause of action irrespective of whether it arises within or without the state.⁹ This shows that consent to jurisdiction, if once properly given, may cover a broader field than cases arising out of the business done in the state.¹⁰

But in the principal case, where service was by statute made on the secretary of state because of the corporation's failure to name an agent, the court held that such service was unconstitutional as to causes of action arising outside the state, although intimating that the contrary result would follow had the cause arisen in the state. To be sure, if the statutory condition of entrance, requiring submission to such process, brought about a deprivation of the constitutional rights of the corporation, the provision might be invalid. Thus a foreign corporation cannot validly agree not to bring actions in a federal court in return for the privilege of doing business in the state.¹¹ There have been *dicta* to the effect that "a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law."¹² If for the sake of argument it is admitted that there is such a limitation on a state's excluding power, nevertheless the principal case does not fall within it. As the corporation by voluntarily entering the state has actually consented to the provisions of the existing statute for serving process, true jurisdiction over it *in personam* is acquired,¹³ and it is far different from its waiving in advance its constitutional rights and thus having its property later taken without jurisdiction or due process.

The principal case therefore seems incorrect if it stands for the proposition that there is actual consent if the corporation designates agents in

⁶ *St. Clair v. Cox*, 106 U. S. 350; for a full discussion of what constitutes "doing business" in a state, see BEALE, *FOREIGN CORPORATIONS*, ch. 8.

⁷ *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147. Consent in fact is based on reasonable impressions gained from the acts of the parties rather than on actual mental condition. The corporation does the act of entering the state to do business, the act which the state has said signifies consent to jurisdiction, and having done this act, has consented. See BEALE, *FOREIGN CORPORATIONS*, § 74.

⁸ *Moch v. Virginia Fire, etc. Co.*, 10 Fed. 696.

⁹ *Barrow Steamship Co. v. Kane*, 170 U. S. 100. See Edward Quinton Keasbey, Esq., in 12 HARV. L. REV. 1.

¹⁰ Of course, in each case it is a question of construing the state statute to determine just what the foreign corporation has agreed to do. In the principal case, the statute clearly covered both local and foreign causes of action. In the former Louisiana statute on the subject (set out in 31 So. 175) the jurisdiction of the state courts was strictly limited to causes arising in the state. In the light of this former limitation the general words of the present statute are properly construed to cover all causes of action arising within or without the state. In *Old Wayne, etc. Ass'n v. McDonough*, 204 U. S. 8, relied on in the principal case, the talk of the court, which was probably a *dictum*, was directed towards a statute which was much narrower in terms, and the case can only be cited properly on the grounds of statutory construction. See 20 HARV. L. REV. 572.

¹¹ See 28 HARV. L. REV. 304.

¹² *Day, J.*, in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 83.

¹³ See footnotes 5 and 7, *supra*.

pursuance of the statute or, even though it fails to, if service is made on its agents, — while there is no consent if service is made on a state officer. Indeed the court seems to assume that actual consent does exist, for it intimates that such service would be proper for actions arising in the state. There is no logical reason why the consent is not to the full extent of the statute.¹⁴ Or if the Supreme Court means that there is no real consent to jurisdiction and that it is therefore contrary to due process, how may the corporation be made by the state to waive its constitutional rights as to domestic and not as to foreign causes? On either view the result is inconsistent, and means that the corporation is excused from paying the full agreed price for a privilege granted.

LOSS CAUSED BY FEDERAL SHIFTING OF HARBOR LINES. — It is not uncommon to be startled by the outcome of particular litigation when it is looked at apart from the close logic or compelling policy that underlies it. Such is the case with regard to a recent expression by the Supreme Court of the United States on the question of federal control over navigable waters. *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251. The plaintiff sought to enjoin the Secretary of War from destroying without compensation a wharf which he had built in conformity with the state and with the later established federal harbor line, but which had become an obstruction to navigation under the harbor line as now changed by the War Department. The relief was denied.¹

At first thought this result seems altogether shocking. Instead of stimulating commerce by the fixing of a harbor line, the government may find itself in the position of deterring development along the waterfront. Investors will not dare risk their capital if they must act at the peril of seeing it become a total loss when the Secretary of War changes his mind. Nevertheless the decision seems analytically correct. Sovereign powers that affect the welfare of the public cannot become the subject of grant. Congress can no more by estoppel clog its power to regulate commerce, than a state can contract away its police power. Whenever the executive in a *bonâ fide* exercise of its discretion alters the harbor line to meet the requirements of navigation, it must remove all obstructions that come within it. No structure can be erected that is not subject to the public easement of passage, and removing an obstruction cannot be a *taking* in the forbidden sense.

Even were the question debatable on principle, there is a coherent line of authority which would make the present decision inevitable. It was early settled that under its power to regulate commerce Congress may at any time assume control of all navigable waters that are accessible

¹⁴ Thus, if the statute is clear, the service may be had even after the corporation has ceased to do business in the state. See 19 HARV. L. REV. 52. The same is true if the cause arises in the state, but not in the course of any of the corporation's regular state business. *American Casualty Ins. Co. v. Lea*, 56 Ark. 539, 20 S. W. 416.

¹ Lamar, J., dissenting. For a more complete statement of facts, see p. 814 of this issue.

to interstate commerce, and may keep them free from obstruction.² When the plaintiff acted in accordance with the then existing state regulations he was therefore, of course, subject to impending federal action. To lodge in the Secretary of War the requisite discretion to determine the facts concerning what limitations are properly to be laid on the riparian owners in the interest of commerce is not invalid as a delegation of the legislative function.³ It, of course, follows that his power is not exhausted by a single exercise, for the public easement remains always dominant, and the changing requirements of commerce will demand varying limitations.⁴ Whenever such a change is made, hardship is apt to occur, but numerous other results have been sustained that eclipse that of the principal case. A railway company was compelled to remove without compensation a bridge which it had erected under an express state charter, when the Secretary of War decided that it interfered with navigation, and the fact that he had acquiesced over a long period of time was given no weight whatever.⁵ An oyster company is entitled to no indemnity if in the process of dredging a channel an oyster bed is destroyed which it has taken years to develop.⁶ Access to the shore may be cut off by a pier which is necessary to the protection of the channel.⁷ Perhaps the most extreme case of all is where a power company which had erected an expensive plant on the bank of a river with the express consent of the Secretary of War was forbidden by Congress from taking any water whatever from the stream, even the surplus above what was needed for navigation.⁸

But by way of contrast to all of this it was held that where the government erected a dam which flooded the plaintiff's land he was entitled to compensation.⁹ The result of this last case indicates the correct distinction. Within the scope of the public easement of navigation no individual can acquire more than permissive rights, but when the scope of that easement is to be geographically extended, compensation must be made for the loss which it imposes. Another contrasted distinction is that where an improvement company has been authorized to perform a particular act of regulation for the government, such as the building of a dam, the property cannot be taken over without compensation.¹⁰ Apparently it was with this in view that the plaintiff urged that his wharf was a benefit to navigation that had been acquiesced in by the War Department. In a sense the principal case does seem to go a step

² See *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, 725.

³ *Union Bridge Co. v. United States*, 204 U. S. 364.

⁴ *Philadelphia Co. v. Stimson*, 223 U. S. 605.

⁵ *Union Bridge Co. v. United States*, *supra*; see also *West Chicago Railroad Co. v. Chicago*, 201 U. S. 506. For a similar principle applied to the states, see *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U. S. 561.

⁶ *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82.

⁷ *Scranton v. Wheeler*, 179 U. S. 141. See 14 HARV. L. REV. 451.

⁸ *United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53.

⁹ *United States v. Lynah*, 188 U. S. 445.

¹⁰ *Monongahela Navigation Co. v. United States*, 148 U. S. 312. This case was explained in *Lewis Blue Point Oyster Co. v. Briggs*, *supra*, as based upon estoppel, because action was taken "at the instance and implied invitation of Congress." As it is difficult to see how Congress could estop itself out of its sovereign rights, it is submitted that the case really rests upon the fact of the plaintiff's being entitled to compensation for the public work he had contracted to do.

farther than previous authority, — for the bridges and other structures that hitherto have become obstructions chanced not to be facilities of maritime commerce. But, of course, the benefit of the plaintiff's wharf, although built for water traffic, accrued solely to himself. It was not built for public benefit under express contract with the government.

RECENT CASES

ADMINISTRATIVE LAW — ESSENTIALS OF HEARING BEFORE ADMINISTRATIVE BOARD ACTING JUDICIALLY. — An order of the state public utilities commission, made after public hearing as required by statute, was based on evidence obtained at the public hearing, and also upon *ex parte* investigations of the commission, of which the party affected was ignorant. *Held*, that this procedure violates the statutory requirement of a hearing. *Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, 107 N. E. 841 (Ill.).

This adds another to the list of American cases requiring that administrative boards shall not act in their quasi-judicial capacity without full disclosure of all evidence affecting the result. The principles involved are discussed in 28 HARV. L. REV. 198. See also 27 HARV. L. REV. 683.

BILLS AND NOTES — FORMAL REQUISITES — PROVISION TO APPLY COLLATERAL SECURITY TO ANY INDEBTEDNESS TO THE HOLDER. — A note made by the plaintiff recited that collateral had been deposited as security for its payment or for the payment of any other liability to the holder thereof. The note, with the security, was transferred to the defendant for value before maturity, and he seeks to hold the collateral as security for other debts of the plaintiff to him. The plaintiff having tendered the amount of the note sues for conversion. *Held*, that the plaintiff cannot recover. *Oleon v. Rosenbloom*, 93 Atl. 473 (Pa.).

The recital of collateral securing a note, similar to a power to confess judgment, does not destroy its negotiability. *Towne v. Rice*, 122 Mass. 67; see BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 5. Security for the payment of the note itself follows the note into the hands of subsequent holders and accrues to their benefit. *Carpenter v. Longan*, 16 Wall. (U. S.) 271. As between the original parties the security may also be applied to the payment of other debts as well as the note, according to the terms of the contract between them, if it so provides. *Hathaway v. Fall River National Bank*, 131 Mass. 14; *Union Brewing Co. v. Inter-State Bank & Trust Co.*, 240 Ill. 454, 88 N. E. 997. The word "holder" is a well-defined mercantile term, and when the agreement of the maker is unambiguous, to secure all debts to the holder, it is held that he likewise may thus broadly use the security. *Richardson v. Winnissimmet National Bank*, 189 Mass. 25, 75 N. E. 97; *Mulert v. National Bank of Tarentum*, 210 Fed. 857. This result need not be based upon any theory of the negotiability of such general security along with the note, or of a contract for the benefit of a third party. The maker has simply created a power, or agency, collateral to the note, to pass over the security for this broad purpose to anyone becoming a holder of the note. This would seem to be adequate to clothe the holder with the rights claimed.

CONFLICT OF LAWS — RIGHTS AND OBLIGATIONS OF FOREIGN CORPORATIONS — ASSESSMENT UPON MEMBER OF FOREIGN MUTUAL BENEFIT INSURANCE

ASSOCIATION AUTHORIZED BY STATUTE OF CORPORATION'S DOMICILE. — The plaintiff joined, in New York, a mutual benefit insurance association, incorporated in Canada, and licensed to do business in New York. Under the authority of a special act of the Canadian Parliament, the association, to meet a threatened deficit, levied a heavy assessment, not authorized by the policies, which was declared a lien on the policies. The plaintiff sues to have the lien set aside. *Held*, that the lien is invalid. *M'Clement v. Supreme Court, I. O. F.*, 88 N. Y. Misc. 475 (Sup. Ct.). On the same facts, in an action on the policy, *held*, that the lien is valid. *Stockwell v. Supreme Court, I. O. F.*, 216 Fed. 205 (Dist. Ct., W. D., N. Y.).

For a discussion of the extent of the control retained over a foreign corporation by the sovereign of its domicile, see NOTES, p. 797.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — ENHANCEMENT OF TESTAMENTARY CAPACITY BY CHANGE OF DOMICILE. — A Dutch subject made her will in Holland, appointing her intended husband heir of her estate, which consisted wholly of personalty, "with reservation only of the legitimate portion or the lawful share" coming to her descendants. The marriage was then celebrated in Holland, the domicile of both parties. Later they became domiciled in England, where the testatrix predeceased her husband, leaving children also surviving. By Dutch law the "legitimate portion" of the children would have taken three-fourths of the estate, whereas the English law contained no such restriction. *Held*, that the husband is entitled to the entire estate. *In re Groos*, 9 Wkly. Notes, 100, 138 L. T. J. 409 (Ch. Div.).

A previous adjudication decided that the subsequent marriage did not revoke the will. *In the Estate of Jeanne Theodora Groos*, [1904] P. 269. See also DICEY, CONFLICT OF LAWS, 2 ed., 680, 686; Lord Kingsdown's Act, 24 & 25 VICT., c. 114. Consequently, the sole problem under consideration was to determine who was entitled. It is fundamental that a will of personalty becomes effective according to the law of the maker's domicile at death. *Moultrie v. Hunt*, 23 N. Y. 394; *Nat. v. Coons*, 10 Mo. 343; see *Dupuy v. Wurtz*, 53 N. Y. 556, 560. English law, therefore, determined the testatrix's capacity. Questions of construction, however, are to be settled according to the law of the domicile at the time of making. *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354. Dutch law, then, controlled this. Here the words in the circumstances under which they were used said that the husband should have all the property save that which the law required be given the testatrix's direct descendants. The Dutch law contained such a limitation on capacity. The English law, which came to govern in this respect, did not. The meaning of the words, however, continued constant; merely their legal effect was changed. Analogous situations would be the intervention between the date of the will and the testator's death of a *mortmain* statute increasing the amount of property that might be disposed of to charity, or of an enactment that devises should not carry rents partially accrued at the testator's death. *In re Bridger*, [1894] 1 Ch. 297; *Hasluck v. Pedley*, L. R. 19 Eq. 271.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CARRIER REQUIRED TO PERFORM TERMINAL HAULAGE FOR ANOTHER. — An order of the Interstate Commerce Commission required a carrier having extensive terminal facilities in a city over which it performed terminal haulage for two other railroads to perform the same service for a third, to which service had previously been refused. *Held*, that the regulation is due process of law. *Pennsylvania Co. v. United States*, 236 U. S. 351.

For a discussion of this case and its tendency to remove any supposed constitutional barriers interfering with the enforcement of through connecting carriage, see NOTES, p. 799.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RECEPTION OF VERDICT IN PRISONER'S ABSENCE — UNCONSTITUTIONAL CONVICTION UNDER VALID STATUTE. — The appellant was convicted of murder by a verdict rendered in his absence, to which, however, his counsel had consented. On his first motion for a new trial, this was not specified as error, and both the trial and appellate courts found untrue allegations that the jury had been dominated by a mob. On a subsequent motion to set the verdict aside as depriving the appellant of his constitutional rights, it was held that absence at the reception of the verdict had been waived by the failure to take timely advantage of it, and it was again found that the jury had not been influenced by a hostile mob. The United States District Court refused a hearing on the appellant's petition for a writ of *habeas corpus*, setting forth the reception of the verdict in his absence and the same allegations of mob domination which the state court had found untrue. *Held*, that the hearing was properly refused. *Frank v. Mangum*, 35 Sup. Ct. 582.

For a discussion of objections to the reception of evidence raised in the first motion for a new trial, see 27 HARV. L. REV. 762. For a discussion of the issue of this appeal, see NOTES, p. 793.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REQUIRING DELIVERY OF CARS TO CONNECTING CARRIER. — Pursuant to statute, the Michigan Railroad Commission made an order requiring the defendant railroad to deliver its cars to a connecting electric railway for transportation to points of consignment along the line of the latter. The order did not provide for compensation, but in mandamus proceedings the state court held that the defendant would be entitled to compensation under the statute. *Held*, that the regulation is due process of law. *Michigan Central R. Co. v. Michigan Railroad Commission*, 236 U. S. 615.

For a discussion of this case, in connection with the question of the constitutionality of orders requiring through carriage, see NOTES, p. 799.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL, AND RELIGIOUS — RIGHT TO VOTE AT FEDERAL ELECTIONS. — A federal statute makes it unlawful to "conspire to injure, threaten, or intimidate any citizen in the free exercise of any right secured to him by the Constitution or laws of the United States." U. S. COMP. STAT. 1913, § 10183. The defendants were convicted under this statute for having conspired to prevent certain duly qualified electors from voting at an election where members of Congress were chosen. *Held*, that the conviction is proper. *United States v. Aczel*, 219 Fed. 917 (Dist. Ct., Ind.).

The defendants contended that the privilege of voting at such an election was conferred by the state alone, and in no wise by the Constitution or laws of the United States. It is true that the Constitution does not confer immediately upon any one the right to vote. *Minor v. Happersett*, 21 Wall. (U. S.) 162; see *United States v. Cruikshank*, 92 U. S. 542, 556; *United States v. Reese*, 92 U. S. 214, 217. And the only control which the federal government has over purely state elections lies in the enforcement of the Fifteenth Amendment. *Lackey v. United States*, 107 Fed. 114. But where federal officers are to be chosen at the election, a different situation arises. The Constitution now provides that members of the House of Representatives and Senators shall be elected by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. Art. 1, § 2; Seventeenth Amendment, § 1. The states thus fix the qualifications for their electors, and the United States adopts these qualifications for its own electors. *Ex parte Siebold*, 100 U. S. 371, 388; *Ex parte Yarbrough*, 110 U. S. 651, 663; *Swafford*

v. *Templeton*, 185 U. S. 487. So that to those coming within the qualifications, the privilege of voting is ultimately secured by the Constitution, and within the protecting power of Congress. *Ex parte Yarbrough*, *supra*; see *Wiley v. Sinkler*, 179 U. S. 58. The well-considered opinion in the principal case would therefore seem clearly correct.

CONTRACTS — DEFENSES: FRAUD — MISSTATEMENT OF PRINCIPAL'S MINIMUM SELLING PRICE BY AGENT AUTHORIZED TO RETAIN WHOLE SURPLUS. — A broker, authorized to sell certain land at \$12,000 or any higher price and retain the whole surplus, stated to the buyer that the land could not be bought for less than \$12,500. Later, under pretence of having seen the owner at the defendant's request, he declared that the owner would take no smaller sum. He now sues on a check for \$500 given by the buyer to complete payment for the land at that price and the buyer pleads fraud. *Held*, that the broker may recover. *Aronowitz v. Woollard*, 152 N. Y. Supp. 11 (App. Div.).

Courts have gone far to justify seller's talk as immaterial, or expressing opinion only, and to hold the buyer to a standard of care. *Page v. Parker*, 43 N. H. 363; *Mooney v. Miller*, 102 Mass. 217; *Graffenstein v. Epstein & Co.*, 23 Kan. 443. See 2 KENT, COM. 486. The overworking of these methods of approaching the problem has been criticised. See 8 HARV. L. REV. 63; 15 *id.* 576; 25 *id.* 472. But the misstatement by the seller of the lowest price he will accept furnishes an instance where "seller's talk" must be permitted although the statement is one of material fact and the buyer may not be negligent, because the inherent nature of a bargain would render any other rule highly unreasonable and impracticable. And there is much reason to extend this exemption to the agent, especially where, as in the principal case, he is the only party interested in keeping up the price. *Ripy v. Cronan*, 131 Ky. 631, 115 S. W. 791; *McLennan v. Investment Exchange Co.*, 170 Mo. App. 389, 156 S. W. 730; cf. *Merryman v. David*, 31 Ill. 404. *Contra*, *Hokanson v. Oatman*, 165 Mich. 512, 131 N. W. 111. In the principal case, as the agent has gone further and has led the buyer to believe that the seller had been given an opportunity to reconsider, it is possible that he has exceeded his privilege and that his recovery should accordingly be defeated on account of fraud. *Kice v. Porter*, 22 Ky. L. Rep. 1704, 61 S. W. 266. But it seems proper to allow the buyer to reap no benefit from his meddlesome questions which would unfairly prejudice the plaintiff's bargain if truthfully answered or ignored.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — DISREGARDING THE CORPORATE FICTION. — The defendant by fraud obtained patents to certain lands. In order to keep the title concealed until after the statutory period for setting aside these patents had elapsed, he organized a corporation to which he conveyed the lands, but failed to record the conveyance. Suit to annul the patents was brought against him within the statutory period; but the corporation was not joined until after the statutory period had elapsed. *Held*, that the patents may be annulled. *Linn & Lane Timber Co. v. United States*, 236 U. S. 574.

Where a new party is brought into a suit, the Statute of Limitations continues to run as to him until actually made a party. *Shaw v. Cock*, 78 N. Y. 194; *Miller v. McIntyre*, 6 Pet. (U. S.) 61. But the court in the principal case declares that since the corporation was the mere tool of the defendant, it will not be treated as a new party. It is generally said that the courts will disregard the fiction of a separate corporate entity whenever this becomes necessary to the attainment of justice. 3 COOK, CORPORATIONS, 7 ed., §§ 663, 664; 2 MORAWETZ, PRIVATE CORPORATIONS, § 227. Such broad statements have led to much loose thinking. In nearly all the cases, moreover, the desired

result could have been reached on other more satisfactory grounds. See 20 HARV. L. REV. 223; 27 *id.* 386. And in general, the courts should be extremely cautious in relying upon a principle so vague, and so likely to breed confusion in the law of corporations. See *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 219. But where the corporate machinery is obviously being used to perpetrate a fraud, and where a just result can be reached on no other theory, it is perfectly justifiable to disregard the fiction. The peculiar interest of the principal case lies in the fact that it appears to be one of the few instances in which a disregard of the fiction is really necessary. It is still barely possible, however, that the same result might have been reached on the ground that by colluding with the grantee to perpetrate his fraud, the corporation had estopped itself from setting up the statute. See *Union Mortgage, Banking & Trust Co. v. Peters*, 72 Miss. 1058, 18 So. 497; *Bridges v. Stephens*, 132 Mo. 524, 543.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — SUIT IN BEHALF OF CORPORATION: EFFECT OF PRIOR SUIT BY ANOTHER STOCKHOLDER. — The plaintiff brought a shareholder's bill to have a contract between his corporation and a third party set aside as fraudulent. The defendant set up a prior suit by another shareholder in which the agreement had been attacked as voluntary and *ultra vires*. Held, that the matter is *res judicata*. *Dana v. Morgan*, 219 Fed. 313 (Dist. Ct., S. D., N. Y.).

A shareholder's bill is founded upon the right of the shareholder to compel the corporation to assert some right or defense which it has against the third party. *Hearst v. Putnam Mining Co.*, 28 Utah 184, 77 Pac. 753. The corporation is, therefore, a necessary party; and its refusal to sue, or facts disclosing the futility of a demand for suit, must be alleged. *Davenport v. Dows*, 18 Wall. (U. S.) 626; *Hawes v. Oakland*, 104 U. S. 450; *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244. Since, in substance, a right of the corporation is in issue, an adjudication on the merits bars a subsequent action either by the corporation or by another shareholder. *Montezuma Cattle Co. v. Dake*, 16 Colo. App. 139, 63 Pac. 1058; *Hearst v. Putnam Mining Co.*, *supra*; *Alexander v. Donohoe*, 143 N. Y. 203, 38 N. E. 263. But if the prior action does not go to the merits, as where the suit is dismissed for failure to allege the refusal of the corporation to sue, a subsequent action can be maintained. *The Telegraph v. Lee*, 125 Ia. 17, 98 N. W. 364. The principal case correctly disallows a second action even though relief was asked on a varied ground. See *Fayerweather v. Ritch*, 91 Fed. 721, 725. This result, although perhaps occasionally depriving a corporation of a right of action lost through a shareholder's unsuccessful method of presentation, seems justifiable as a deterrent to corporate inaction. It would, of course, not follow were the shareholder suing in his own right. See *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513.

DEATH BY WRONGFUL ACT — DEFENSES TO STATUTORY LIABILITY — RELEASE BY DECEASED. — The plaintiff's husband, who was killed by defendant's negligence, before his death gave a full release of all claims. The widow now sues, under a statute giving the next of kin an action where death is caused by negligence. Held, that she may recover. *Rowe v. Richards*, 151 N. W. 1001 (S. D.).

For a discussion of the questions raised by this case, see NOTES, p. 802.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — LIABILITY TO WIDOW WHO MARRIED DECEASED AFTER INJURY. — The deceased, after being mortally injured through the defendant's negligence, married the plaintiff who had previously become engaged to him. The plaintiff now sues

as executrix under N. Y. CODE CIV. PROC., §§ 1902-4, which allows the personal representative of the deceased to recover for the benefit of the widow or next of kin the pecuniary loss resulting from the death to the statutory beneficiaries. *Held*, that she may recover substantial damages. *Radley v. Le Ray Paper Co.*, 108 N. E. 86 (N. Y.).

The so-called death statutes modeled after Lord Campbell's Act have been generally held to create a new right, unknown to the common law, vesting in the statutory beneficiaries on the death of the injured person. *Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145, 58 N. E. 50. See *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294, 304. *Contra*, *Dolson v. Lake Shore & M. S. Ry. Co.*, 128 Mich. 444, 87 N. W. 629. The right is thus not a survival of the deceased's cause of action and no damages can be recovered for personal injuries to him. *Meekin v. Brooklyn Heights R. Co.*, *supra*. Furthermore, the statute here grants recovery only for pecuniary loss suffered by the beneficiary, and it is settled that no damages for injuries to feelings and loss of companionship will be recognized. *Tilley v. Hudson River R. Co.*, 24 N. Y. 471. Therefore, though the plaintiff, as widow of the deceased, is clearly within the description of the statute and entitled to at least nominal damages, she cannot claim, as widow, damages received as *fiancée*, since no right of action is given a *fiancée*. Hence the measure of her recovery should be her husband's probable expectancy of life at the time of the marriage. To be sure, a posthumous child has been allowed to recover damages based on the father's expectancy at the time of the accident. *The George & Richard*, 1 L. R. 3 A. & E. 466, 480; *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 14 S. W. 1021. But this recovery can only rest upon the inchoate right of an unborn child to the support of its parent, — a right peculiar in that it is broken as soon as it arises. See 15 HARV. L. REV. 313. It is submitted that a *fiancée* has no analogous inchoate right to the support of her future husband in addition to her rights arising from the contract to marry. Yet the principal case is in accord with the only other direct authority on the point. *Gross v. Electric Traction Co.*, 180 Pa. St. 99, 36 Atl. 424.

DEEDS — CONSTRUCTION AND OPERATION IN GENERAL — EFFECT OF REDELIVERY OF AN UNRECORDED DEED TO THE GRANTOR IN ORDER TO DIVEST TITLE FROM THE GRANTEE. — The plaintiff sold land and, to avoid recording his own deed, redelivered it to his grantor and had a deed made directly to the purchaser, who entered into possession, paid the full purchase price and made various improvements. The plaintiff now tries to recover back the land upon the ground that, since the contract was by parol, he was not divested of his legal title. *Held*, that the plaintiff is estopped from asserting his title. *Rowe v. Epling*, 173 S. W. 801 (Ky. App.).

Under the recording acts, the title of a vendee cannot be defeated by an unrecorded deed of which he had no notice. *Ely v. Brewer*, 62 So. 742 (Ala.). But ordinarily the purchaser would have full notice of the prior deed in situations like that in the principal case, and cannot claim protection on this theory. And the weight of authority holds that the statute of frauds prevents the revesting of title in the grantor by the mere redelivery or cancellation of the deed. *Botsford v. Morehouse*, 4 Conn. 550. *Contra*, *Commonwealth v. Dudley*, 10 Mass. 403. See 1 DEVLIN, DEEDS, 3 ed., § 300. But the courts usually give the new purchaser relief on the ground that the grantee is estopped from asserting his legal title. *Potter v. Adams*, 125 Mo. 118, 28 S. W. 490; *Howard v. Huffman*, 3 Head (Tenn.) 562. *Contra*, *Raynor v. Wilson*, 6 Hill (N. Y.) 469. The elements of a strict estoppel are not present if it be assumed that the vendee knows the real situation. But the result may be supported upon the theory that the grantee, by deliberately destroying the evidence of his title, is precluded from setting up secondary evidence to defeat his intention.

Gugins v. Van Gorder, 10 Mich. 523; *Parker v. Kane*, 4 Wis. 1, 12; *Farrar v. Farrar*, 4 N. H. 191, 195. See 18 HARV. L. REV. 105, 110. Other jurisdictions protect the purchaser by enjoining the grantee from setting up his legal title. *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262; *Reavis v. Reavis*, 50 Ala. 60. And wherever the transaction between the grantee and his vendee is itself in writing, or is taken out of the statute of frauds by part performance, as in the principal case, the vendee's equity for specific performance independently secures him against the grantee's assertion of his legal title. *Whisenant v. Gordon*, 101 Ala. 256, 13 So. 914.

EMINENT DOMAIN—WHEN IS PROPERTY TAKEN—LOSS CAUSED BY FEDERAL SHIFTING OF HARBOR LINES.—Pursuant to the authority given him by Congress to fix harbor lines in waters navigable for interstate purposes beyond which riparian owners should not build, the Secretary of War fixed a line in the Elizabeth River which took in the plaintiff's wharf. The plaintiff showed that his wharf had been erected in conformity with state regulation, and also did not transgress an earlier federal line established after his wharf was built, and asked that an injunction issue to prevent its destruction without compensation. Held, that the relief will be denied. *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251.

For a discussion of the principles involved, see NOTES, p. 806.

EVIDENCE—DECLARATIONS CONCERNING INTENTION, FEELINGS, OR BODILY CONDITION—EXPRESSIONS OF PRESENT PAIN MADE TO A PHYSICIAN AT AN EXAMINATION TO QUALIFY HIM AS A WITNESS.—The defendant's physician examined the plaintiff's injured ankle, not for the purpose of giving medical treatment, but to qualify as a witness at the trial then pending. He was permitted to testify that, upon pressure on the injured part, the plaintiff flinched. The defendant objected that such flinching was a mere declaration of the plaintiff made to a physician for the sole purpose of enabling him to testify. Held, that the testimony is inadmissible. *Norris v. Detroit United Ry.*, 151 N. W. 747 (Mich.).

Expressions of present pain, if involuntary, are admissible, without reference to the hearsay rule. When voluntary, like other attempts to convey thought, they possess a hearsay character, but are nevertheless generally admitted under an exception to the hearsay rule. See 3 WIGMORE, EVIDENCE, § 1718. Though a few jurisdictions confine the exception to declarations made to a physician, they are generally held admissible no matter to whom made. *Indiana Ry. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156; *Baltimore & Ohio R. Co. v. Rambo*, 8 C. C. A. 6, 59 Fed. 75. Contra, *Reed v. New York Central R. Co.*, 45 N. Y. 574; *Lake St. El. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374. And the mere fact that litigation has begun is not a sufficient bar. *Matteson v. New York Central R. Co.*, 35 N. Y. 487. Cf. *Mott v. Detroit, etc. Ry. Co.*, 120 Mich. 127, 79 N. W. 3. However, in many jurisdictions a strict limitation is placed upon the exception where, as in the principal case, the declaration was made to a physician to enable him to testify in an action for the injury. *Grand Rapids & Indiana R. Co. v. Huntley*, 38 Mich. 537; *Darrigan v. New York & New England R. Co.*, 52 Conn. 285. Contra, *Quaife v. Chicago, etc. Ry. Co.*, 48 Wis. 513, 4 N. W. 658; *Kent v. Lincoln*, 32 Vt. 591. A few jurisdictions confine this restriction to cases where the plaintiff himself calls the physician for the sole purpose of securing his testimony. *Abbot v. Heath*, 84 Wis. 314, 54 N. W. 574. But such a distinction is unwarranted, for the danger of fraud and pretence on the plaintiff's part when he has the litigation so closely in mind, is present no matter who called the physician. However, rather than fix for all cases any binding limitation of this sort, it would seem better to let the judge in his discretion determine whether the chance for imposition and

fraud renders the testimony too dangerous to leave to the jury. In any event, the jury, of course, may gauge the weight of the evidence according to the circumstances under which the declarations were made. See *Matteson v. New York Central R. Co.*, *supra*, p. 491; *Kent v. Lincoln*, *supra*, p. 598.

EVIDENCE — HEARSAY: IN GENERAL — USE OF ACCOUNT-BOOKS TO PROVE NON-DELIVERY OF GOODS. — In an action for goods sold, the defendant was allowed to introduce both his books of account and the testimony of his book-keeper to show that there was no record of receiving the goods. *Held*, that this was error. *Winder v. Pollack*, 151 N. Y. Supp. 870 (Sup. Ct., App. Term).

The account-books could not be admitted under the ancient shop-book exception, for the defendant had a clerk. *Ruggles v. Galton*, 50 Ill. 412. See *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300. But this limitation has undoubtedly been frequently relaxed by rather loose statutes. See 2 WIGMORE, EVIDENCE, § 1538. Under the shop-book exception, moreover, the evidence was inadmissible on the ground taken by the court, that it was merely negative. *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557; *Alexander v. Smoot*, 13 Ired. (N. C.) 461. But see 2 WIGMORE, EVIDENCE, § 1556. Under the broader exception admitting entries made in the course of duty, this objection should have no force. *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524; *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164; *Huebener v. Childs*, 180 Mass. 483, 62 N. E. 729. *Contra*, *Lawhorn v. Carter*, 11 Bush. (Ky.) 7. Of course any record to be thus used as evidence that something did not occur must be both regular and exhaustive. *Shaffer v. McCrackin*, 90 Ia. 578, 58 N. W. 910; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84. But these books were clearly inadmissible as entries in the course of duty, since the entrant was available in court. *Bartholomew v. Farwell*, 41 Conn. 107; *State Bank of Pike v. Brown*, 165 N. Y. 216, 59 N. E. 1. There is, however, still a third possible way of introducing this kind of evidence. Under modern statutes allowing parties to testify in their own behalf, account-books can be used to supplement or refresh a witness' memory, and the shop-book exception becomes unnecessary. *Nichols v. Haynes*, 78 Pa. 174; *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 18 S. W. 904. *Bushnell v. Simpson*, 119 Cal. 658, 51 Pac. 1080. See 2 WIGMORE, EVIDENCE, § 1560. Accordingly, if the books in the principal case were tendered under this last theory, to supplement the clerk's recollection, they should have been admitted, though their proof was merely negative. *State v. McCormick*, 57 Kan. 440, 46 Pac. 777; *Guy v. Mead*, 22 N. Y. 462. But see *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448.

FOREIGN CORPORATIONS — CONDITIONS UPON THE RIGHT TO DO BUSINESS — VALIDITY OF JUDGMENT ON FOREIGN CAUSE OF ACTION BASED ON SERVICE ON STATE OFFICER. — A Louisiana statute provided that suit might be commenced against a foreign corporation which did business in the state by service of process on the secretary of state if the corporation had failed to designate agents on whom process could be served. After such service and with no actual notice, judgment by default was entered against such a corporation in the state court on a cause of action arising outside the state. The corporation now seeks, in the federal court, to enjoin the enforcement of this judgment on the ground of lack of jurisdiction in the state court. *Held*, that the judgment will be enjoined. *Simon v. Southern Ry. Co.*, 236 U. S. 115.

See this issue, p. 804, for a discussion of the principles involved in this case.

FRANCHISES — RIGHT TO ENJOIN COMPETITOR ILLEGALLY DOING BUSINESS WITHOUT LICENSE. — The plaintiff telephone company sought to enjoin a competitor from engaging in the telephone business without a license from the Public Utilities Commission, which was required by law. KANSAS LAWS, 1911,

ch. 238, § 31. *Held*, that no injunction will be granted. *Baxter Tel. Co. v. Cherokee County Mut. Tel. Ass'n*, 146 Pac. 324 (Kan.).

Where a public franchise is set up as a defense to *prima facie* tortious conduct, its validity may be challenged by the plaintiff, even though a private individual. *Smith v. Warden*, 86 Mo. 382; *Vredenburgh v. Behan*, 33 La. Ann. 627. But in the principal case the defendant's act in stringing competing wires was not *per se* tortious, for the plaintiff's franchise was not exclusive. As the mere usurpation of a public privilege could not without more constitute a private wrong to the plaintiff, the result seems clearly correct. *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Coffeyville Gas, etc. Co. v. Citizens' Natural Gas, etc. Co.*, 55 Kan. 173, 40 Pac. 326. *Cf. Cope v. District Fair Ass'n*, 99 Ill. 489.

FRAUDULENT CONVEYANCES — TRANSFERS FOR VALUE — CONVEYANCE IN SATISFACTION OF UNENFORCEABLE EXPRESS TRUST. — A testator was induced not to change a will leaving property to A, by A's promise to give half the property to B. A later transferred to B land equal in value to half of the property received under the will. This transfer made A insolvent, and his creditors bring this action to have it set aside as fraudulent. *Held*, that the conveyance will not be set aside. *Walter Farrington Tiling Co. v. Hazen*, 151 N. Y. Supp. 523 (App. Div.)

A *bona fide* conveyance by an insolvent debtor in preference of a creditor who has an enforceable legal or equitable claim against him cannot be set aside as in fraud of creditors. WAIT, FRAUDULENT CONVEYANCES, 3 ed. § 390; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *Atlantic National Bank v. Tavener*, 130 Mass. 407. A mere moral obligation, however, is not sufficient to support such a conveyance. *Fair Haven Marble & M. S. Co. v. Owens*, 69 Vt. 246, 37 Atl. 749; *Cock v. Oakley*, 50 Miss. 628. But a conveyance in satisfaction of an unenforceable trust or in settlement of a debt barred by the statute of limitations or the statute of frauds, cannot be attacked by creditors on the ground that the debtor could have set up an unconscionable defense, for the law regards such obligations as subsisting though the remedy is barred. *French v. Molley*, 63 Me. 326; *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584; *Norton v. Mallory*, 63 N. Y. 434. See 13 HARV. L. REV. 608. *Cf. Holden v. Banes*, 140 Pa. 63, 21 Atl. 239. The decision of the principal case is based on this last proposition. In fact, however, it seems that the conveyance was in satisfaction of a perfectly valid equitable obligation; for where a testator is prevented from revoking a gift in his will by the promise of the beneficiary to hold it for another, the beneficiary becomes liable in equity as constructive trustee of the property received. *Dowd v. Tucker*, 41 Conn. 197; *Belknap v. Tillotson*, 82 N. J. Eq. 271, 88 Atl. 841. See 28 HARV. L. REV. 237, 379. And if, as the principal case seems to indicate, the estate conveyed represented the proceeds of the bequest, the trust attached to this very property. On this hypothesis, the result of the principal case is more easily reached as property subject to a constructive trust is not subject to the claims of creditors. *Cox v. Arnsmann*, 76 Ind. 210. See POMEROY, EQ. JUR., 3 ed., §§ 721, n. 1, 1053.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — JURISDICTION OF STATE COURT OVER SUIT AGAINST INTERSTATE CARRIER WITHOUT PRIOR ACTION BY THE COMMISSION. — The railroad had established certain rules governing car distribution among coal companies for interstate shipments during periods of car shortage. The plaintiff brings suit in a state court complaining that the railroad failed to furnish the quota which, according to these rules, it should have received. *Held*, that the state court has jurisdiction. *Pennsylvania R. Co. v. Puritan Mining Co.*, 237 U. S. 121.

Complaints attacking the reasonableness of rates, or the validity of general rules and practices, involve problems of administrative discretion which call imperatively for uniform solution. Over these a single administrative tribunal, the Interstate Commerce Commission, alone has jurisdiction. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio Ry. Co. v. Pitcairn Coal Co.*, 215 U. S. 481. On the other hand complaint of conduct which contravenes the Interstate Commerce Act as matter of law, and which, therefore, involves no administrative question, may be brought either before the courts or before the Commission. *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184. To this rule the principal case adds a further distinction: that a complaint that an existing rule was violated, rather than that it was unreasonable, need not be brought before the Commission. The further holding that it may be brought before a state court presents another problem. Under Section 9 of the Interstate Commerce Act, damage caused by violation of the Act can be sued upon in the federal courts or before the Commission. 4 U. S. COMP. STAT., 1913, § 8573. By implication the state courts are deprived of jurisdiction. *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 9 So. 441. See *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 250. But Section 22 of the Act saves all remedies existing at common law. 4 U. S. COMP. STAT., 1913, § 8595. In an effort to give meaning to this proviso, the court holds that for violation of a right existing at common law, but merely reaffirmed by the Act, suit may be brought in state courts. Cf. *Galveston, etc. Ry. Co. v. Wallace*, 223 U. S. 481.

MASTER AND SERVANT — ASSUMPTION OF RISK — PROMISE BY MASTER TO EFFECT SUCH A CHANGE IN THE METHOD OF WORK AS TO MAKE THE EMPLOYEE'S SERVICES UNNECESSARY. — The plaintiff was employed by the defendant to carry off waste material. The custom was to throw the waste in sacks from a second-story window into the plaintiff's wagon. The plaintiff objected to this as being a dangerous method of work and the defendant had promised to install a chute which would render the plaintiff's services unnecessary. The plaintiff continued work but was injured before the change was made. Held, that the plaintiff cannot recover. *Medlin Milling Co. v. Mims*, 173 S. W. 968 (Tex. Civ. App.).

Where a servant continues in employment relying on a promise to repair the defective premises, the defense of assumption of risk is not available. *Clarke v. Holmes*, 7 H. & N. 937; *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979. Although a distinction was attempted in the principal case, it seems clear that this doctrine applies as well to a promise to install a new method as to one merely to repair a defect. *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. 188. See 4 LABATT, MASTER AND SERVANT, 2 ed., p. 3857. Nor should the fact that the employment involves only simple labor with common implements change the result. *Brouseau v. Kellogg Switchboard & Supply Co.*, 158 Mich. 312, 122 N. W. 620; *Louisville Hotel Co. v. Kaltenbrun*, 26 Ky. L. Rep. 208, 80 S. W. 1163. Contra, *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Webster Mfg. Co. v. Nesbitt*, 205 Ill. 273, 68 N. E. 936. But the fact that the promised remedy would deprive the servant of his job presents a question of more difficulty. A variety of technical reasons have been more or less unsuccessfully advanced for the effect attributed to the master's promise to repair. See 4 LABATT, MASTER AND SERVANT, 2 ed., pp. 3874 *et seq.* Such reasons aside, if the only policy underlying it is to enable the servant to retain permanent employment without being at his own risk during the continuation of the promise, then the case is correct, as here the plaintiff must lose his situation anyway. But it is submitted that the principal ground is that of justice to the servant because the master for his own benefit has induced the servant to stay. See *Schlitz v. Pabst Brewing Co.*, *supra*; Professor

Bohlen in 20 HARV. L. REV. 14, 91-93. The employer should therefore be liable whether or not the servant by doing him the favor hopes to retain his position.

NEGLIGENCE — DUTY OF CARE — ELECTRIC WIRES: DUTY OF ELECTRIC COMPANY TO LICENSEE ON LAND OF THIRD PARTY. — A fireman entering a city hall in the course of his duties in order to extinguish a fire was killed by contact with a pipe which had become charged with electricity through the negligence of the defendant company, which had wired the hall. His administrator now sues. *Held*, that he may recover. *Barnett v. Atlantic City El. Co.*, 93 Atl. 108 (N. J.).

It is settled that a fireman is a mere licensee. See cases collected in 35 L. R. A. N. S. 60. The decision in the principal case takes the ground that the special exemption by virtue of which the landlord is not required to use ordinary care in regard to the condition of his premises does not shield third parties. *Commonwealth Elec. Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052; *Day v. Consolidated, etc. Co.*, 136 Mo. App. 274, 117 S. W. 81. This idea has been applied even where the plaintiff may have been a trespasser. *Caglione v. Mt. Morris Elec. Lt. Co.*, 56 N. Y. App. Div. 191, 67 N. Y. Supp. 660; *Connell v. Keokuk, etc. Co.*, 131 Ia. 622, 109 N. W. 177. See also *Guinn v. Delaware, etc. Co.*, 72 N. J. L. 276, 62 Atl. 412. In other jurisdictions the electric company's duty has been held no greater than the landowner's. *McCaughna v. Owosso, etc. Co.*, 129 Mich. 407, 89 N. W. 73. And this view has been applied where the defendant itself was at most a licensee at sufferance. *Cumberland, etc. Co. v. Martin's Adm'r*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718. Other states hold the electric company liable to a mere licensee, irrespective of its status, on the theory that electricity is such a dangerous agency that even the landlord would be so liable. *Wittleder v. Citizens', etc. Co.*, 50 N. Y. App. Div. 478, 64 N. Y. Supp. 114. *Augusta Ry. Co. v. Andrews*, 92 Ga. 706, 19 S. E. 713. *Cf. Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760. Some courts apply this theory even in favor of technical trespassers. *Lynchburg Telephone Co. v. Bokker*, 103 Va. 595, 50 S. E. 148; *Newark, etc. Co. v. Garden*, 23 C. C. A. 649, 78 Fed. 74. *Contra, Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203. Several authorities, on the other hand, take the ground that if the plaintiff touches the defendant's wires he may thereby assume the status of a licensee or a trespasser toward the defendant and as such be denied recovery. *New Omaha, etc. Co. v. Anderson*, 73 Neb. 49, 102 N. W. 89; *Rodger's Adm. v. Union, etc. Co.*, 123 S. W. 293 (Ky.); *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50. *Cf. Hector v. Boston Elec. Lt. Co.*, 161 Mass. 558, 37 N. E. 773. But on the whole the result in the principal case seems fair, in spite of the argument that the landowner's exemption should extend to anyone who works on his premises for his benefit.

POLICE POWER — NATURE AND EXTENT — STATUTE REGULATING THE PRIVATE USE OF INTOXICANTS. — The defendant was convicted under a Kentucky statute making it a crime to keep liquor elsewhere than in the owner's private residence. *Held*, that the statute is unconstitutional. *Commonwealth v. Smith*, 173 S. W. 340 (Ky. Ct. App.).

Kentucky had previously held unconstitutional a similar inhibition applying to private residences. *Commonwealth v. Campbell*, 133 Ky. 50, 117 S. W. 383. So this decision has at least the merit of consistency. In so far as these cases rest upon limitations upon legislative power in the state constitution, the conclusion cannot profitably be criticised. But the court also took the broad ground that regulation of private use of intoxicants is outside the police power. This view has support. *Ex parte Brown*, 38 Tex. Cr. 295, 42 S. W. 554; *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283; *State v. Williams*, 146 N. C. 618, 61 S. E. 61; *Eidge v. Bessemer*, 164 Ala. 599, 51 So. 246. Other cases apparently

in accord involve simply the legislative power of municipal corporations. *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590; *Sullivan v. Oneide*, 61 Ill. 242. But there are contrary adjudications. *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096; *Easley v. Pegg*, 63 S. C. 98, 41 S. E. 18. See *Mugler v. Kansas* 123 U. S. 623, 660. The court theorizes that the police power can be exercised only on behalf of the public, while this statute concerned individual conduct. Yet at common law suicide and self-mayhem were crimes. *Rex v. Russell*, 1 Moody C. C. 356; *Wright's Case*, Co. Lit. 127*a*. See 1 BISHOP, CRIMINAL LAW, 8 ed., §§ 259, 511. This statute should be upheld unless judicial eyes can clearly see it has no reasonable bearing on the public health, morals, peace, or welfare. See *Mugler v. Kansas*, *supra*; *Powell v. Pennsylvania*, 127 U. S. 678; *Holden v. Hardy*, 169 U. S. 366. If the statute be overthrown, one who has satiated his protected right privately to renounce sobriety might forthwith tire of seclusion, and burst forth a public menace. Furthermore, the "public" is but a composite of individuals, who should not be entitled singly to jeopardize their own health and increase the possibility of their becoming public charges. The principal case would seem to recognize a constitutional guaranty to the individual not to be deprived of life, liberty, or liquor.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — PROHIBITION OF NIGHT WORK BY WOMEN IN FACTORIES. — The defendant was convicted under a New York statute (CONS. LAWS, c. 31, as amended by LAWS 1913, c. 83) which provided that "no woman shall be employed or permitted to work in any factory in this state before six o'clock in the morning or after ten o'clock in the evening of any day." *Held*, that the statute is constitutional. *People v. Charles Schweinler Press*, 53 N. Y. L. J. 81 (N. Y. Ct. of App.).

For a discussion of the significance of this decision as marking the present attitude of the courts in approaching questions of "due process," see NOTES, p. 790.

POLICE POWER — REGULATION OF TRADE, PROFESSIONS, AND BUSINESS — PROTECTION OF THE ECONOMIC WELFARE OF A STATE. — A Florida statute prohibited the shipment of fruit that was "unripe or otherwise unfit for consumption." The petitioner, who had been arrested for attempting to ship unripe oranges from Florida to Alabama, sought a writ of *habeas corpus* on the ground that the statute, so far as it applied to interstate shipments, was an invalid exercise of police power by the state. *Held*, that the statute is constitutional. *Sligh v. Kirkwood*, 237 U. S. 52.

To reach the unique point of this case it must be premised that the statute in question presents no conflict with federal jurisdiction over interstate commerce. There appears to be no enactment of Congress that deals with the situation, for the Food and Drugs Act applies only to decomposed fruit. U. S. COMP. STAT., 1913, § 8723. And there can be little doubt that since Congress has taken no affirmative action, the restriction placed upon interstate commerce is of the incidental sort which is not objectionable. *Hennington v. Georgia*, 163 U. S. 299; *Minnesota Rate Cases*, 230 U. S. 352, 402. Since the shipment involved was designed for the citizens of other states, the statute could not be upheld as a health measure, but had to be rested upon the novel principle that the state may prevent the shipment of unripe fruit because such sales injure the reputation of the state in an industry which is vitally related to its entire economic welfare. There is room for difference of opinion as to the probability of injury of this sort, but the legislature could not be deemed unreasonable in thinking that indiscriminating buyers in the outside markets would associate the injurious quality of the fruit with the fact that they came from Florida. It

may also be questioned whether the police power should be exerted to promote the material prosperity of the public, but there can be no doubt that the principle has made a substantial beginning in American law. See *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267; *Eubank v. City of Richmond*, 226 U. S. 137. The result of the principal case is closely analogous to a previous decision which upheld prohibiting the owner of a gas or oil well from allowing waste which tended to exhaust the underground reservoir that was common to the entire community. *Ohio Oil Company v. Indiana*, 177 U. S. 190. And the damage to other citrus producers in the state is of the same sort which results from unfair competition or monopoly, the statutory prevention of which has never been thought invalid. See *Pearsall v. Great Northern Railway Company*, 161 U. S. 646. In the principal case an act is in question which is inimical to the financial welfare of the whole state, and there seems to be no reason why the legislature should be powerless to prevent it merely because the channel of causation passes at one point outside of the jurisdiction.

PRESUMPTIONS — EXISTENCE AND EFFECT OF PRESUMPTIONS IN PARTICULAR CASES — NO PRESUMPTION ON A PRESUMPTION. — The body of the deceased was found on the defendant's track five hundred feet below a crossing. A foot severed from the body was found caught in a frog at an intermediate point. To charge the railroad with the violation of a duty, it was necessary to prove that the deceased was struck at the crossing. The facts relied on were that footprints were found there and that marks such as might have been made by a body dragged by a train extended from the crossing to the point where the body was found. The jury was asked to infer that the footprints were those of the deceased, that he was struck at the crossing, carried along until his foot caught in the frog, and then killed. The plaintiff obtained a verdict. *Held*, that the verdict must be set aside. *Atchison, T. & S. F. Ry. Co. v. De Sedillo*, 219 Fed. 686 (C. C. A., 8th Circ.).

See NOTES, p. 795, for a discussion of the maxim "No presumption upon a presumption," upon which the result in this case was based.

RULE AGAINST PERPETUITIES — ANNUAL GIFTS OF INCOME SUBJECT TO VARIATION IN AMOUNT BY EXTRANEOUS CIRCUMSTANCES. — Under a power in her marriage settlement, the wife appointed the fund by will to trustees to hold till her insane son died or became sane. Each year the trustees were to pay him a sum sufficient to bring his income from all sources up to £200 a year, the residue, if any, to be distributed among other sons. *Held*, that the trust is altogether void. *In re Whiteford*, [1915] 1 Ch. 347.

The court bases its decision on the fact that the gift to the son is not vested, and consequently calls the whole too remote. Had it allowed the payment for any one year, however, the son's right to that year's income would vest, and that vesting would not affect the contingent character of the gift in future years. If that year the son should receive a large legacy bringing in a £200 income, none of the gift would vest in him that year, and yet that would not prevent payments in future years should his legacy be dissipated. It is submitted that this should not be considered as one gift, but rather as a series of yearly gifts, all contingent. On this analysis the court erred in not allowing payments to the son for twenty-one years after the mother's death. While the problem would seem *res integra*, an analogy is afforded by the cases where there is a series of gifts to the person who shall fill a certain description each year. One case has called such a gift bad *in toto*. *Siedler v. Syms*, 56 N. J. Eq. 275, 38 Atl. 424. Professor Gray criticised this, and his view has been followed in a case that holds the gifts good for twenty-one years. *Lyons v. Bradley*, 168 Ala. 505, 53 So. 244. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 410 *a-e*.

SALES — CONDITIONAL SALES — REMEDIES OF SELLER: BREACH OF A COLLATERAL CONTRACT AS DEFENSE TO REPLEVIN. — The seller of a piano under a conditional sale contract agreed that he would use reasonable efforts to sell pianos to those whose names the buyer sent in, and would apply the commissions therefrom on the purchase price. The seller now brings replevin for the piano, and the buyer sets up a breach of this agreement. *Held*, that the seller may recover. *Kohler & Chase v. Turner*, 146 Pac. 393 (Wash.).

In a conditional sale a breach of warranty by the seller is, by the weight of authority, no defense to an action of replevin. *Hauss v. Savarese*, 87 N. Y. Misc. 330, 149 N. Y. Supp. 938; *People's Electric Ry. Co. v. McKeen Motor Car Co.*, 214 Fed. 73. See *contra*, *Guilford, Wood & Co. v. McKinley*, 61 Ga. 230, 233. These cases are often explained on the ground that no action for breach of warranty can accrue until title has passed. See *Frye v. Milligan*, 10 Ont. 509. In substance, however, a conditional sale amounts to an executed sale with a chattel mortgage back. See WILLISTON, SALES, § 326. Thus the sounder explanation is that, as the buyer's right of action neither gives him a lien on the goods, nor prevents him from being in default, it can be no defense to the seller's action to recover possession. *Blair v. Johnson & Sons*, 111 Tenn. 111, 76 S. W. 912. But if the seller has himself prevented the performance of the condition, he cannot claim that the buyer is in default. Thus, a tender of payment by the buyer and refusal by the seller will vest title in the buyer and leave the seller to his action for the price. *Ingersoll-Sergeant Drill Co. v. Worthington*, 110 Ala. 322, 20 So. 61; *Leflore v. Miller*, 64 Miss. 204, 1 So. 99. The situation is analogous if the seller has agreed to let the buyer work out the purchase price, and refuses to give him the work to do. *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479. Hence, when the seller's breach of contract has prevented the buyer from paying in the way agreed upon, the seller should be unable to assert the default in those payments. *Gilbert Co. v. Husted*, 50 Wash. 61, 66, 96 Pac. 835, 836; see *Brownfield v. Jones Co.*, 98 Ark. 495, 500, 136 S. W. 664, 666. The language of the court in the principal case does not seem in accordance with this view, but the case may be explained on the ground that it did not appear that the buyer was not in default in an amount in excess of that which would have been paid by means of the commissions.

USURY — VALIDITY OF USURIOUS MORTGAGE — RIGHT OF INNOCENT PARTY TO THE MORTGAGE TO FORECLOSE: NEW YORK LAW. — The defendant attempted to evade the New York statute which declares all contracts for usurious loans absolutely void (N. Y. CONSOL. LAWS, GENERAL BUSINESS LAW, INTEREST AND USURY, § 373), by executing a mortgage to a dummy mortgagee, and procuring its discount to the plaintiff at an illegal rate of interest. Though the purchase price, which was paid to an agent, went directly to the mortgagor, the mortgagee was ignorant of the nature of the transaction and supposed that the mortgage was merely assigned to him. *Held*, that he may enforce the mortgage to the extent of the consideration paid. *Schanz v. Sotscheck*, 152 N. Y. Supp. 851 (App. Div.)

Though on principle the purchase of an accommodation note, since the indorsee is buying the credit of a third person, is not a loan but a true sale, New York and several other states hold such a transaction usurious if the note is discounted at more than the legal rate of interest. *Claflin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Whitten v. Hayden*, 7 Allen (Mass.) 407; cf. *Eastman v. Shaw*, 65 N. Y. 522. *Contra*, *Dickerman v. Day*, 31 Ia. 444; *Holmes v. State Bank of Duluth*, 53 Minn. 350; *Moore v. Baird*, 30 Pa. 138. But the purchase of a mortgage from a dummy mortgagee is distinguishable. Since it is in substance the giving of money to the mortgagor in reliance on his credit alone, it is a true loan, and properly subject to the usury law. Entirely apart from the New York view as to accommodation paper, therefore, the mortgage in the

principal case is absolutely void for usury and no action would lie on the instrument. In the ordinary case arising under the New York statute, it would be contrary to the policy of the statute to allow the lender to recover even his principal, for the contract is expressly made altogether void. But where the lender is an innocent party, as in the principal case, since to refuse recovery would allow the borrower to profit by his own wrong at the expense of one who is entirely innocent, it seems proper to impose a quasi-contractual liability and allow the mortgage to be enforced to this extent. See *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 152. This, rather than estoppel, seems to be the true basis of the highly just result of the principal case and of other New York decisions in accord. *Payne v. Burnham*, 62 N. Y. 69; *Verity v. Sternberger*, 62 N. Y. App. Div. 112, 70 N. Y. Supp. 894, aff'd 172 N. Y. 633, 65 N. E. 1123. But where in addition to the representation involved in the mere act of transfer there is an express representation that the instrument is valid, the New York courts, on the ground that the mortgagor is estopped to set up the usury, allow a recovery in full upon the instrument. *Rider v. Gallo*, 153 N. Y. App. Div. 334, 137 N. Y. Supp. 1015; *Union Dime Savings Institution v. Wilmot*, 94 N. Y. 221; cf. *Hurlbut & Sons v. Straub*, 54 W. Va. 303. This seems wrong, since it is not possible to be estopped into liability on an absolutely void contract. See 19 HARV. L. REV. 454.

VESTED, CONTINGENT, AND FUTURE INTERESTS — FUTURE INTERESTS IN PERSONALTY — ACTION FOR DAMAGES TO CHATTEL, BY EXECUTORY LEGATEE AGAINST EXECUTOR OF FIRST HOLDER. — A necklace was bequeathed to A, with remainder to B in the event of A's dying childless. The contingency occurred, and B now sues A's estate to recover for damage done to the necklace by A and for the loss of part of it. Held, that B can recover. *In re Swan*, 10 Wkly. Notes 113 (Ch. Div.).

There has been much controversy on the question whether interests in chattels personal are executory or are vested when a corresponding interest in realty would be. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 117 a; 14 HARV. L. REV. 397. In the principal case, however, that problem is not involved, as the bequest to B after A's absolute estate is on any view executory. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 835. In the analogous situation in realty, damage to the property by the first owner is an immediate wrong to the executory devisee. This is shown by the fact that he may at once enjoin waste. *Turner v. Wright*, 2 DeG., F. & J. 234. In the case of a contingent remainder, where the prior estate must certainly determine in favor of someone, damages for part waste are also recoverable, but will be impounded for the benefit of whomever later proves to be entitled. *Watson v. Wolff-Goldman Realty Co.*, 95 Ark. 18, 128 S. W. 581. But in an executory devise, as the contingency ending the first estate may never arise, no such damages can be given. *Ohio Oil Co. v. Doughetee*, 240 Ill. 361, 88 N. E. 818. As soon as the executory devisee comes into possession, however, as he is now ascertained, the objections to allowing him a remedy vanish. A wrong with a suspended remedy is not anomalous; for example, an ultimate remainderman who had no action for waste may sue if the intermediate estate subsequently lapsed. See *Duval v. Waters*, 1 Bland (Md.) 569, 573. It is submitted that the same result should be reached in the case of chattels, and as the injury is to property it should survive. See *Jenkins v. French*, 58 N. H. 532. The court in the principal case, while correct in decision, was troubled with the survivorship point and avoided it by the questionable discovery of a trust or bailment in the first holder.

WITNESSES — EXAMINATION — CROSS-EXAMINATION TO CREDIT: INTEREST OF WITNESS IN OUTCOME OF SUIT. — In a suit for personal injuries the defendant called as a witness the conductor in charge of the car which had caused the damage. On cross-examination the plaintiff sought to discredit the wit-

ness by proving his contract of employment, which provided that the employer might reimburse himself for all damages caused by the negligence of the conductor by deducting the sum from his wages. The evidence was excluded. *Held*, that this is reversible error. *Henry v. Tacoma Ry. & Power Co.*, 219 Fed. 874 (C. C. A., 9th Circ.).

Although the old rule disqualifying a witness pecuniarily interested in the result of a suit has been almost everywhere abolished, nevertheless it is proper to discredit the testimony of a witness by showing interest. *Luckhurst v. Schroeder*, 149 N. W. 1009, 1012 (Mich.); see 2 WIGMORE, EVIDENCE, § 969. Therefore it has been held that the fact that a witness is employed by one of the parties to the suit may be considered by the jury as bearing on his credibility. *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714. *Cf. Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209. In addition, the servant's common-law liability for his own negligence may be pointed out. See *Hamilton v. Chicago, M. & St. P. Ry. Co.*, 103 Ia. 325, 331, 72 N. W. 536, 538. The contract in the principal case, since it gives the employer the right to deduct from the conductor's wages, in addition to his common-law right to reimbursement, increases the employee's pecuniary interest in the outcome of the suit. It correspondingly intensifies the temptation to lie, and should be admissible to discredit the witness. Accordingly, the result of the principal case is questionable only in that it reverses the trial judge on a point resting so largely within his discretion. *Miller v. Smith*, 112 Mass. 470, 476; see 2 WIGMORE, EVIDENCE, § 944.

WITNESSES — PRIVILEGED COMMUNICATIONS — HUSBAND'S LETTERS TO WIFE. — In a prosecution for bigamy, the state offered letters from the husband to the alleged first wife to establish the fact of that marriage. These letters had fallen into the hands of a third person, and were then secured by the prosecution. *Held*, that the letters are admissible. *McNeill v. State*, 173 S. W. 826 (Ark.)

The privilege not to have private communications between husband and wife disclosed may be waived, since the evidence itself is not fundamentally inadmissible. See *Perry v. Randall*, 83 Ind. 143, 146; *Stickney v. Stickney*, 131 U. S. 227, 237. *Contra*, *Goodrum v. State*, 60 Ga. 509. But the privilege belongs not to the addressee alone, but to the communicating party, or possibly to both. *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005. A voluntary delivery, therefore, by the addressee should not suffice to waive the privilege. *Mahner v. Linck*, 70 Mo. App. 380; *Wilkerson v. State*, 91 Ga. 729, 17 S. E. 990. But where the letter is originally sent with knowledge that it will be read by a third person there is clearly no privilege. *De Leon v. Territory*, 9 Ariz. 161, 80 Pac. 348. Again, a conversation overheard is similarly unprivileged, for although there is no intention to publish the communication, there is a publication by the act of the person entitled to the privilege. *Commonwealth v. Everson*, 29 Ky. L. Rep. 760, 96 S. W. 460; *Commonwealth v. Griffin*, 110 Mass. 181. Where a third party obtains the letter without the consent of the other spouse there is clearly no publication, but the weight of authority, in accord with the principal case, makes no distinction and holds the privilege equally inoperative. *Hammons v. State*, 73 Ark. 495, 84 S. W. 718; *State v. Hoyt*, 47 Conn. 518; *State v. Buffington*, 20 Kan. 599. *Contra*, *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. 219; *Bowman v. Patrick*, 32 Fed. 368. A further ground of the decision is that the defendant, by denying the validity of the first marriage, is precluded from asserting the privilege of a spouse. Since the burden of establishing a privilege falls upon the party attempting to assert it, it is immaterial that it is equally inconsistent for the prosecution, while asserting the validity of the first marriage, to object to the assertion of the privilege. *Contra*, *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656.

BOOK REVIEWS

CONSERVATION OF WATER BY STORAGE. By George F. Swain, LL.D. New Haven: Yale University Press. 1915. pp. xvii, 384.

This is a book which deserves to be brought to the attention of lawyers, not merely because the subject is one with which lawyers at present are having much to do, but even more because the author, unlike most laymen who have written upon such questions, has exerted himself to find out what the law is and to consider the relation of the law to matters of engineering import instead of employing the easier but less profitable method of ignoring or abusing the law. The chapters which are of particular interest to the legal profession are: Chapter 3. Water power at government dams on navigable streams; Chapter 4. Water power at private dams on navigable streams; and Chapter 5. Water power on the public domain. The appendices contain valuable information with respect to legislation upon the subject of water rights, and there is a full bibliography, extending over thirteen pages, which should be useful to lawyers and legislators as well as to engineers.

In recent years a notion has sprung up that running water is *res publica*; that it is owned by the state in exactly the same way, for example, that the state house is owned. This idea had its origin in the attempts of western states to make constitutional provision for the adoption of the appropriation system where it was feared federal patents had fastened the system of riparian rights upon considerable areas. All that these assertions of state ownership ever really achieved was to assert a state sovereignty with respect to the use of the water resources of the state, which really needed no assertion. To-day we may see three theories with respect to control of the use of water in competition. By the common-law theory the water of running streams is to be used and used only by riparian proprietors who are limited to a reasonable use of the water; that is, a use consistent with a like use by all others similarly situated. According to the appropriation doctrine, developed in the Pacific and Rocky Mountain states, the prior appropriator of the waters of a stream to a beneficial use acquires a property right to use the amount of water which he has appropriated, and at present, with the advent of the "use theory" as the prevailing idea in the water law of the western states, such right is measured in its extent and its duration by the beneficial use to which the water is put. A third system is the system of the Roman law with respect to what the Romans called "public streams," namely, the method of concession or franchise whereby the sovereign concedes to certain persons at a fixed toll or rental the privilege of using the water of running streams. The French code makes every stream which is capable of floating a boat or raft a public stream for the purposes of this rule. The Prussian water law of 1913 also gives a wide extension to this method of government concession. The doctrine of the civil law was obviously not adapted to the necessities of the pioneers of the Pacific slope when the appropriation doctrine was adopted in this country, for at that time there was no organized government at hand on the public domain to license use of streams, there had been no survey of the water resources of the country, and the idea of such license or concession was foreign to the individualistic ideas of the pioneer. But the federal government, assuming that it has complete common-law riparian rights on the public domain in all of our states where public domain exists, and taking advantage of its power to prevent encroachment upon navigation in navigable streams, has been inclined of late to adopt a policy which amounts to nothing less than an importation of the civil-law idea

into this country. Perhaps Professor Swain assumes too readily the soundness of the contention of federal administrative officers with respect to water on the public domain in states where riparian rights do not exist under the local law. See Mr. Bannister's article, "The Question of Federal Disposition of State Waters in the Priority States," 28 HARV. L. REV. 270. But he is undoubtedly in accord with eminent legal authority in conceding this claim, and it is not material to his argument which view is taken. In any event, the attempt to use local resources in undeveloped parts of the country as a means of raising general revenue, operates, as Professor Swain points out, simply to perpetuate a system of waste and is like nothing so much as the insistence of Great Britain prior to the American Revolution upon exercise of its technical legal authority to raise general revenue out of the colonies. After all there is a great deal in a name. If a policy of waste is labelled conservation, the label may endow it with a long life in the face of common sense and in spite of all that we should have learned from attempts of the federal government to make a profit at the expense of the locality out of the public domain in the territories prior to the Civil War.

The matter is one of politics rather than of law, but it cannot be insisted upon too strongly that those who frame our legislation should understand the legal as well as the economic theory upon which they are proceeding, and those who are called upon to draft legislation in this connection will do well to read and ponder what Professor Swain has to say.

R. P.

THE VALIDITY OF RATE REGULATIONS. By Robert P. Reeder. Philadelphia: T. & J. W. Johnson. 1914. pp. 440.

This is the kind of a book that makes a reviewer's task ungrateful. For an ungrateful task it is to be compelled to say that a great deal of effort, wide reading and considerable intellectual freedom from phrases, have, after all, been unproductive. Few subjects are more important, and surely none more interesting, than a consideration of "the principles of Constitutional Law, which are involved in rate regulation." From a book of four hundred pages, which aims at more than a digest's aloofness from contested issues, one cannot demand less than that it should help somewhat toward the solution of knotty problems — at least to the extent of a penetrating analysis of the issues. What is to be said then of a book on the Validity of Rate Regulation that leaves practically untouched, except for a conventional statement of the cases, the whole problem of compelling unremunerative services or the carriage of specific commodities at unremunerative rates? (See *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. Co. v. Conley*, 236 U. S. 605; 28 HARV. L. REV. 683.)

Instead of grappling with problems such as these, which are peculiarly within the jurisdiction of the author's subject, the bulk of the book — some hundred pages — is devoted to an attempt to demonstrate that the Supreme Court is wrong in extending the "due process" clauses to substantial rights instead of confining them to the safeguarding of orderly procedure. This is shooting at a target which is tempting to all constitutional marksmen, — but what's the use? Holmes and Thayer and Pound and Corwin and Shattuck and the rest have again and again smoked out the enemy, or confined his operations, but he is as alive as von Hindenburg after a defeat. One does not detect even new kinds of weapon in the attack. Particularly immaterial to the main subject of the book is this predominant detour, inasmuch as, so far as questions affecting the validity of rate regulations go, Mr. Reeder, after disposing of questions by throwing "due process" out of the window, lets them walk in again

through the door "of the equal protection of the laws." There cannot be too much insistence on definite meanings for specific clauses of the Constitution, for there is all too much of loose lumping of different provisions, resulting in the creation of an atmosphere of unconstitutionality, in passing on specific measures. To that extent Mr. Reeder's analysis is welcome. But when all is said, the book leaves one with the feeling that here is the uncompressed material for a preface of a treatise on the validity of rate regulations.

F. F.

LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES. By Henry St. George Tucker, LL.D. Boston: Little, Brown, and Company. 1915. pp. xxi, 444.

In these days, when there is a strong tendency to extend the treaty-making power of the United States, such a book as this is timely. The object of the book is to discuss and to endeavor to define the limitations of the treaty-making power. In the early chapters the views of "the fathers of the Constitution" are shown; and it is evident that the present extensions of the treaty-making power were not anticipated. Those entrusted with the treaty-making power since the middle of the nineteenth century are shown to have realized that certain of their acts probably were encroachments upon the rights of other branches of the government, yet to have justified these acts on the ground of high national policy. Against this tendency the opinions of many writers of high authority are stated; and to these are added the support of certain opinions of the Supreme Court.

The varied practice in treaty-making in the days of the Confederation was succeeded by an attempt to define the field of this power through the Constitution. If the clauses of the Constitution relating to treaty-making stood alone and were not part of the larger instrument and thereby limited, the contention of some of those who have from time to time been of the treaty-making bodies could more easily be maintained.

The lack of uniformity in opinions of presidents and secretaries of state as to the limitations of their treaty-making functions offer striking contrasts. Some of these are shown in the chapter devoted to the report of J. Randolph Tucker in 1887 upon the constitutionality of the Hawaiian treaty. In the discussion relating to the principles involved in the Japanese-California controversies, the opinion of the author is in many respects contrary to that of Professor Willoughby and to that of Mr. Root.

The position of Mr. Butler in his book, "Treaty-Making Power under the Constitution," to the effect that the treaty-making power is vested in the central government and "is also possessed by that government as an attribute of sovereignty," is also one entirely opposed to the general thesis of this book. It would likewise seem that Mr. Tucker would consider many recent international agreements which have been negotiated by the United States as without constitutional sanction.

Detailed attention is given to *Chirac v. Chirac*, *Hauenstein v. Lynham*, *Geofroy v. Riggs*, in connection with rights of aliens in relation to rights of states. The author does not consider certain common deductions from the case of *Ware v. Hylton* as justifiable.

Mr. Tucker does not claim to be making a profound contribution to the literature upon the Constitution of the United States, but a simple statement, which is written in easy style, of the power of the United States to make treaties. His conclusions would support a much more strict limitation upon the treaty-making power than has been observed in recent years.

G. G. W.

THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS. By Harvey Cortlandt Voorhees. Second Edition. Boston: Little, Brown, and Company. 1915. pp. xliii, 287.

The first edition of this handy manual was printed in 1904; and the author then expressed the wish of producing "a work so exhaustive that the profession might feel justified in pronouncing it a standard authority on the subject with which it deals." The success of the book has, in some degree at least, corresponded with this aspiration; it "is now in common use in police departments, and law offices." In the preface to the second edition the author lays great (but certainly not too great) stress upon the usefulness of the book to police officers. One may fairly add, however, that it is an excellent elementary summary of the law of arrest and imprisonment for the student and the lawyer. Its claim to be regarded as a standard and exhaustive treatise is rather too broad.

An increase of about one-fifth in the matter of the book is largely caused by the addition of new citations. The number of cases has increased by about one-fourth.

A few errors or misleading statements have been noted. On page 100 it is said that under a hue and cry, a private person may make an arrest even though it should subsequently be shown that no felony had been committed. For this proposition, the case of *People v. Lillard*, 18 Cal. App. 343, is cited. This was not a case of hue and cry, nor did the court mention those words. The hue and cry, properly so called, has of course never existed on this continent. In that case it was an admitted fact that the felony had been committed by the deceased and it was clear that the defendant knew, or had reasonable grounds to believe, that this was the case. The subsequent statement on page 136, citing the same case, that an arrest by hue and cry is not obsolete, is certainly unfounded. On page 131, the statement that any private person, present when a felony is committed, is bound by the law to arrest the felon, has probably never been true in this country. It is certainly not true to-day. In no American case is there even a dictum to that effect, so far as the reviewer has found, except one or two loose statements that it is the duty of a bystander to arrest a felon, and therefore he may justify making the arrest. In these passages "duty" is unquestionably used in the same sense in which it is said to be the duty of a person to defend himself. In the note on page 115, the statement with respect to an officer arresting without warrant for a suspected misdemeanor, is based on the rather unusual provision of the New York Code of Criminal Procedure. The statement is misleading as a statement of general law.

These examples are drawn from one chapter only, but that is the most important one in the book.

J. H. B.

RAILROAD RATE REGULATION. By Joseph Henry Beale and Bruce Wyman. Second Edition by Bruce Wyman. New York: Baker, Voorhis and Company. 1915. pp. xcvi, 1210.

In 1906, as many important amendments to the Interstate Commerce Act, known as the Hepburn Amendments, were about to take effect, Messrs. Beale and Wyman issued their first edition of *Railroad Rate Regulation*. Of course it was not possible to do more than barely to call attention to the important changes produced in the Interstate Commerce Act by the important amendments of 1906.

Again in 1910 Congress gave long and serious consideration to the Interstate Commerce Act as amended in 1906, and again very important amendments resulted.

Again in 1912, by the Panama Act, the Interstate Commerce Commission was given certain additional powers, and in 1913 the Commission was given the power to value the property owned or used by every common carrier subject to its jurisdiction.

In addition to the additional powers given the Interstate Commerce Commission by the extensive amendments mentioned since the first edition of Beale and Wyman on Railroad Rate Regulation, the Commission and the courts have made many most important decisions upon questions that were unsettled when the first edition was issued. For instance, the decisions of the Commission as to when railways can and when they cannot increase their rates, in the celebrated rate cases involving enormous amounts of money, have attracted public attention and discussion because of their great importance.

So, too, recent decisions of the Commission and the courts as to when so-called industrial railways are common carriers, and as such entitled to the rights of common carriers, even though such industrial railways are substantially owned by industries largely served by them, have disclosed a difference of opinion between the Commission and the courts that has provoked not a little discussion among members of the bar and in the public press. Some of these decisions of the Commission, too, have resulted in business delay and confusion that have caused very serious criticism of the Commission among business men and in the public press. The truth is, the Commission's jurisdiction has become so extensive and its burdens so great, that it naturally tries to decide more in a single case than it can well decide, as the courts hold, and therefore it is that it occasionally finds itself compelled to reconsider its own decision, as it did in the Industrial Railways Case, after the decisions of the Supreme Court in the Tap Line cases, and as it did in the Eastern Rate cases after it had been subjected to severe general and public criticism for its first decision and the railways had obtained a rehearing.

Nor is this all. In 1906 many of the states had no commissions worthy of the name. The result was that the powers of a majority of the then existing state commissions were so inadequate that in intrastate matters the railways in most of the states were almost a law unto themselves.

In 1907 Governor Hughes in New York showed that the very important railway business of that state was substantially unregulated by its Railway Commission, and also that other public-service commissions should be subjected to state regulation. Therefore, in spite of strenuous opposition from railways, he was the leader in bringing about legislation providing for two public-service commissions in that state, one in New York City and one "up-state," as it is called, to regulate the services and the charges of not only the railways, but of substantially all public-service corporations of the state of New York. As commissioners to serve upon these commissions, he selected some of the most able men of the state, and so well did they serve the state upon these commissions that almost all complaint of intrastate railway service and other corporation service disappeared, and many other states took up the legislation of New York and from it prepared similar acts adapted to the needs of the various states.

In this way such great states as New York and Pennsylvania, not to mention others, for the first time began adequately to regulate intrastate service of railways and public-service corporations. So rapidly did the state law regulating the intrastate service of public-service corporations develop after the important changes made in that law in the state of New York, under the leadership of Governor Hughes, that in 1911 Mr. Wyman gave us his work of two volumes upon Public Service Corporations, which substantially covers the common-law ground covered by the first edition of Beale and Wyman in their work upon Railroad Rate Regulation, and also covers, in addition thereto, the statutory provisions and changes of the various states, whereby the various

states regulate the services of public-service corporations within their boundaries. In issuing this work upon public-service corporations, Mr. Wyman naturally thus took from the work of Beale and Wyman common-law provisions more germane to public-service corporations within the states than to the matter of railway rate regulation by the federal government, because the federal government does not regulate railway rates by virtue of the common law, but, instead, regulates railway rates by virtue of the federal Constitution, giving it power to regulate interstate commerce, thus giving Congress the power to pass the Interstate Commerce Act and the various amendments thereto.

The consequence of the important changes thus made in both federal and state legislation regulating railway rates and the services of public-service corporations generally, and of the important decisions made by the Interstate Commerce Commission and the various state commissions, and the state and federal courts, touching these important subjects, since the first edition of Beale and Wyman upon *Railroad Rate Regulation* in 1906, is that a work issued July 1, 1906, has become somewhat out of date, and to be valuable to either the courts or the profession it has been necessary to rewrite it, omitting from it the bulk of the common-law matter more strictly applicable to intrastate business and adding to it entire chapters dealing with important amendments made from time to time to the Interstate Commerce Act, and also proper comment upon important decisions made from time to time by the Interstate Commerce Commission and by the federal courts.

The second edition of Beale and Wyman, which has just come from the press, has been prepared by Mr. Wyman, who has profited by his experience as an author, as a practicing lawyer and as a law teacher, from July, 1906, to the present time, and has given us the benefit of his study and experience in the changes and additions made in the structure of the first edition. We have very carefully examined the second edition, and, so far as we have discovered, the second edition is a thorough, accurate and reliable statement of the law to March, 1915, when it issued from the press. Of the second edition, therefore, we may repeat with still greater confidence what we said of the first edition in a review of that edition. We then said (20 HARV. L. REV. 340, etc.):

"The present general demand for such a work is largely due to the Interstate Act Amendments of 1906. . . .

"Historically and legally, this clearly appears. In 1787 Congress was granted the power 'to regulate commerce' (interstate). So far as Congress was concerned, this power remained almost unexercised until a century later, or 1887, when the first Interstate Commerce Act was passed. This act was passed because the attempts of the states to regulate the conduct of railways by the so-called Granger legislation and legislation of that character, in the early seventies, were nullified as to interstate traffic, October 25, 1886, by the necessary ruling of the Supreme Court in *Wabash Ry. Co. v. Illinois*, 118 U. S. 557, 577, that regulation of interstate traffic by railroads 'must be of a national character, and the regulation can only appropriately exist by general rules and principles which demand that it should be done by the Congress of the United States, under the commerce clause of the Constitution. . . .'"

Without quoting further touching the passage of the Interstate Commerce Act and its amendments as to the first edition, we then said:

"The point of view of the authors evidently is, to use their own words, that the railroad problem is to be dealt with for the present on the basis of existing statutes and decisions, whereby to 'control . . . rates and practices of the railroads for public good.' To throw light on the subject, they consider, among other topics, parliamentary regulation of rates, the persistence of state regulation, the theory of *laissez faire*, the growth of public employments, the power of eminent domain, the grant of exclusive franchise, monopoly as a ground for

regulating public callings, requisites of common carriage, the transportation necessary, public business of common carriers, common carriers' right to compensation, primary duties of common carriers, excuses for refusal to serve, strikes, right to protect their own interests, limitations of their charges, right to return on capital, rate of return on capital, right to operating expenses, reasonableness of particular rates, elements involved in reasonable rates, classification of commodities, the effect of length of transportation upon rates, preventing discrimination between competitors and localities, Interstate Commerce Acts of England, the Granger and other state statutes, the Interstate Commerce Acts of 1887, the Elkins Act, and the Interstate Commerce Act Amendments of 1906. Even the regulations of the Commission with reference to printing and publishing schedules of rates, and the procedure before the Commission, and in the courts, are considered.

"The consideration of these topics is in the main most satisfactory, this being particularly true of the difficult one of discrimination in all its forms. . . .

"It is a pleasure carefully to examine a work that sustains such examination so well, to find it both comprehensive and acute, to note the accuracy of its learning, the convenience of its arrangement, the practical quality of its usefulness, and to commend it generally to the profession, which is bound to find such works much more necessary and useful in the future than they have been in the past."

The judgment of all who have used the first edition has justified us in the conclusion there reached, and we feel sure that the second edition will prove equally useful and reliable.

A. M.

THE FORMAL BASES OF LAW. By Giorgio del Vecchio; translated by John Lisle, with introductions by Joseph H. Drake, Sir John McDonnell and Shepard Barclay. Boston: The Boston Book Company. 1914. pp. lvii, 412.

This book is an attempt to define the essential bases of law, the word "formal" being used in the sense of "essential." It was originally written in Italian and has been translated into philosophical English. At times Greek, German, Italian and Latin phrases are employed, without appreciably diminishing the clearness of the English text. It is with diffidence therefore that the reviewer ventures his personal belief as to the author's meaning.

It was said to have been the glory of Socrates that he brought philosophy from the clouds down to the affairs of daily life. Our author has apparently reversed the operation. He has taken the law which we find in daily life to the clouds, — and left it there. So far as the reviewer has been able to ascertain, the author's main thesis is a combination of Plato and Kant. From Plato he takes the thesis that the ideal of a thing exists before any attempt is made to give that thing a physical expression, and remains unaffected by the imperfections of any attempted physical expression of it. To express the thought in concrete form, the mathematical ideal of a circle existed before any attempt was made to draw a circle, and remains unaffected by the imperfections of any circle or circles which are actually drawn. But of course this ideal has no inherent power either to express itself or cause itself to be expressed. So to bring the ideal into existence something more is necessary. The principle which tends to give this ideal concrete expression the author takes from Kant. Kant in the categorical imperative defines and describes that something in human nature which makes man desire to do his duty and realize the ideal. In this the author finds the moving force which tends to realize the ideal of law. By combining this thesis of Kant with the Platonic thesis of the ideal the author discovers the essential bases of law.

Whether the combination of these two elements, both well known to the prior art, and their application to the concept of law discloses patentable invention, the reviewer will leave to philosophers to determine. It certainly gives aid and comfort to that school of the common law which believes that all the law exists somewhere, so much of it as may be necessary being miraculously revealed to the court at the moment when it decides the case. This belief, which is by no means new in the common law, occasionally receives a rude shock when different courts of last resort receive conflicting revelations in regard to the same case, as for example in *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159, and *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206. Doubtless this school of the common law will hail the author as an ally and a prophet.

E. H. A., JR.

A TREATISE ON THE LAW OF INCOME TAXATION. By Henry Campbell Black. Second Edition. Kansas City, Mo.: Vernon Law Book Company. 1915. pp. xxxvii, 865.

The Income Tax seems to have come to stay and a treatise on this heretofore transitory statute is a timely addition to legal literature. Any lawyer familiar with the Bankruptcy Act realizes how impossible it is to get from the material within the four corners of the statute a real grasp on bankruptcy law. One who reads the Income Tax law is confronted with a similar difficulty. Moreover, the present is a particularly auspicious time for the appearance of a work on income taxes. The field is still a new one and at the same time the lapse of two years after the passage of the present statute has given opportunity for more mature reflection than is possible when a treatise is practically coeval with the legislation itself. This state of affairs justifies the appearance of a second edition of Black on Income Taxes.

The student of economics will find little of interest in this book. It is written simply for the lawyer. The author finds the Income Tax actually on our statute books a law which needs interpretation. His purpose is to assist persons who are confronted with problems of the application of this law, and this purpose we think he has fulfilled. The present edition is a marked improvement upon the first edition of the work. Not only has much of the text been rewritten to better advantage in arrangement, but a wealth of new matter has been added. The data of the work consist of the present federal statute, the extinct federal statutes, the various state statutes, cases under these statutes, and the corresponding English, Scotch and Canadian statutes, and of rulings of the Treasury Department. A noteworthy feature is the division of the original text of the statute into logical and concise sections, an attempt by the author to supplement a piece of legislation singularly deficient in grouping and classification. A valuable appendix is attached which embodies, in addition to the federal and state statutes, the general federal acts applicable to the collection of internal revenue and a table of forms.

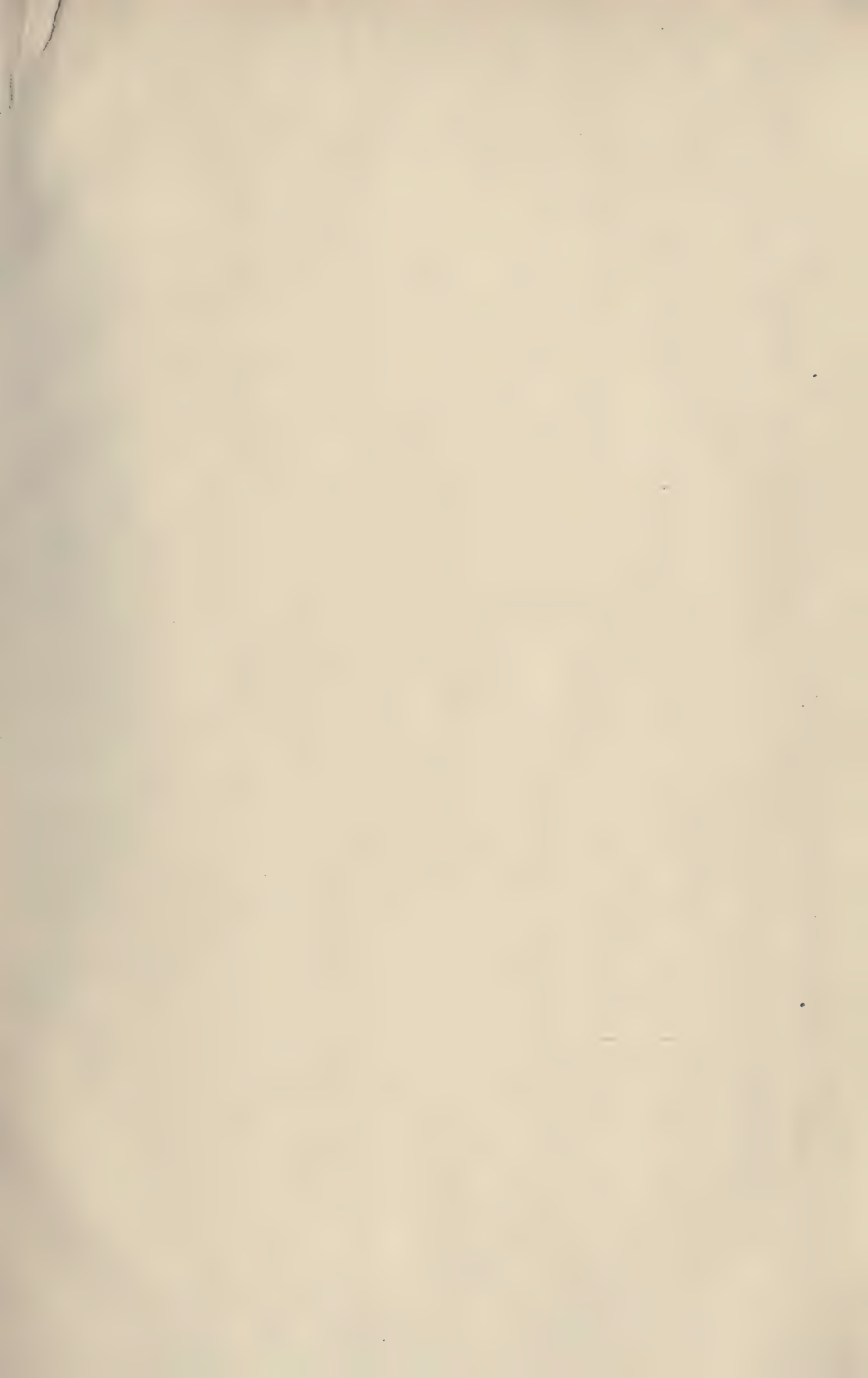
Altogether the work fills a real need of the practicing lawyer in a field where certainty is necessary and conjecture dangerous.

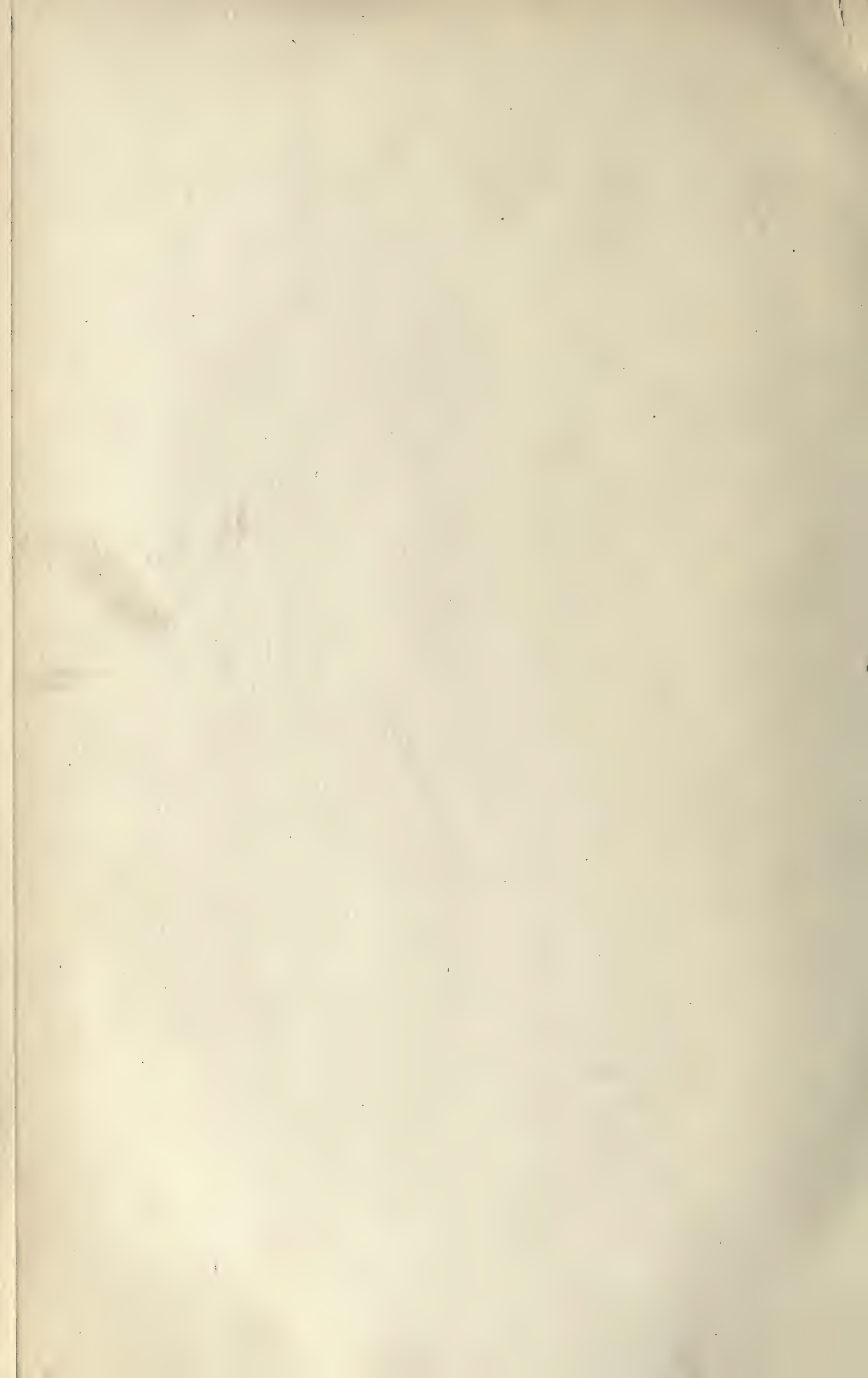
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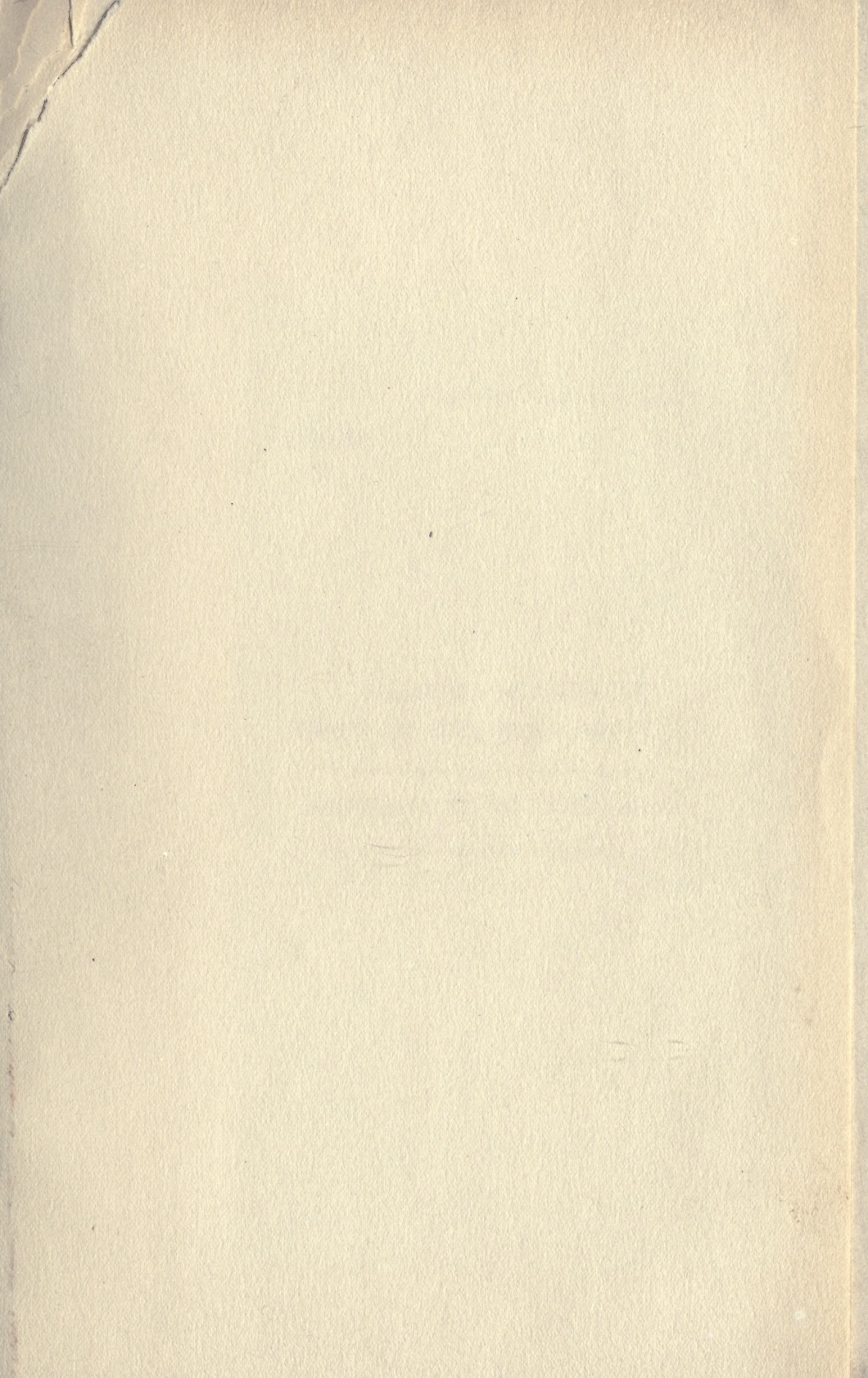
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